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Supreme Court of the United States

OCTOBER TERM, 1961

No. 731

CITIZENS UTILITIES COMPANY (NEWPORT ELECTRIC DIVISION),

Petitioner,

v.

CHARLES S. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

Petitioner respectfully prays that a writ of certiorari issue to review a decision of the Supreme Court of the State of Vermont, certified by the Clerk of that Court to the Public Service Commission of that State on November 21, 1961 (Appendix A, p. 1a).* That decision, one Justice concurring on a separate ground, and the Chief Justice dissenting, reversed a unanimous Decree of the Public Service Commission (now known as the Public Service Board) of the State of Vermont granting petitioner condemnation, and fixing just compensation for the taking of certain lands of respondents.

* The Supreme Court of Vermont did not make a judgment or decree. Its decision contained a direction for certification of the result to the Public Service Commission (Appendix B, pp. 2a-18a). The certificate is set forth hereinafter at Appendix A, page 1a. All appendices are set forth in a separate bound Appendix which is being submitted with the Petition.

Opinion Below

The Opinion of the Supreme Court of the State of Vermont, here sought to be reviewed, was dated November 21, 1961, is not yet officially reported, and is set forth in Appendix B, pages 2a to 18a. Said decision is unofficially reported at 176 A. 2d 751.

The Opinion of the Public Service Commission of the State of Vermont, dated August 26, 1960, and the Additional Findings of Fact by that Commission dated October 17, 1960, are not officially reported, and are set forth at Appendix C, pages 19a to 44a.

Jurisdiction

The jurisdiction of this Court is invoked under the provisions of Title 28 U.S.C. Sec. 1257(3). *Longest* v. *Langford*, 274 U. S. 499 (1927); *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.*, 312 U. S. 38 (1941); *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U. S. 320 (1958).

Questions Presented

Petitioner and its predecessor in interest have for upwards of thirty years diverted water from, and maintained certain penstocks on, land leased from respondents. These penstocks carry water from a dam located on the Clyde River in the State of Vermont to petitioner's generating station downstream.

Under the lease, petitioner was obligated to acquire the leased land after the expiration of the term. One of the methods provided for determination of the price to be paid therefor was by institution of condemnation proceedings

> "* * * before the tribunal then having jurisdiction of such proceedings." (Appendix B, page 4a)

On March 27, 1956, within the stipulated time provided therefor, petitioner commenced a condemnation proceeding before the Vermont Public Service Commission (Appendix B, page 4a).

The questions presented are:

1. Does an order by the Federal Power Commission, without any other or further action on its part, directing a public service corporation, legally existing and operating under state authority, to apply for a license from the Federal Power Commission, in and of itself oust, on the ground of pre-emption, the Vermont Public Service Commission of jurisdiction to continue a condemnation proceeding then validly pending before it?

2. Does the Supreme Court of the State of Vermont have authority to deny condemnation on the ground that the condemnor is not properly authorized by the Federal Power Commission to operate its project—no such determination having been made by the Federal Power Commission, the Agency invested by federal statute with primary jurisdiction in such cases?

3. Where, in accordance with the provision of its lease, a tenant, a public service corporation long operating under the authority and regulation of the State of Vermont, institutes before the Public Service Commission of that State a condemnation proceeding to acquire the demised premises, have the landlords standing to oppose the condemnation on the plea that the tenant has not yet complied with an order of the Federal Power Commission, made during the pendency of the condemnation proceeding, directing the tenant to apply to the Federal Power Commission for a license to operate its project, but containing

no direction to the tenant to discontinue operation of its project, or to halt the pending condemnation proceeding, in the meantime?

Statutes Involved

16 U.S.C., Sec. 817, insofar as here material, provides as follows:

> "It shall be unlawful for any person, State or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, • • • except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter."

16 U.S.C., Sec. 821 provides:

> Nothing contained in this chapter shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein.

Section 111 of 30 Vermont Statutes Annotated, provides, in part, as follows:

> "FINDINGS, DAMS, ASSESSMENT OF DAMAGES: JURY TRIAL
>
> When the [Public Service] commission finds:
>
> (1) In the case of dams, that a certificate of public good authorizing the project as herein required, or a license from the Federal power commission has been granted; and
>
> (3) That the condemnation of such property or right is sought in order that the petitioner may render adequate service to the public in the conduct of such business, it shall adjudge the petitioner entitled to condemn such property or right, shall assess the compensation to be paid therefor, and shall determine the time and manner of such payment."

Statement

For many years up to July 29, 1930, Newport Electric Light Company (Newport), petitioner's predecessor, was the owner of certain lands situated on both sides of the Clyde River in Vermont. Petitioner and its predecessor were engaged in the business of generating and distributing electric power to consumers. The Vermont Public Service Commission found, and the Vermont Supreme

Court did not disturb this finding, that at all relevant times petitioner possessed all authorizations required under the Vermont Statutes (Appendix C, page 25a).

On July 29, 1930, a contract was made whereby Newport conveyed the lands in question to Abbie D. Prouty, respondents' predecessor, and in return took a lease of the lands for a term of twenty-five years commencing October 1, 1930. The lease required that the lessee purchase the property within six months after October 1, 1955 at (1) a price to be agreed upon between the parties and, if they were unable to agree upon a price, (2) at a price to be fixed in condemnation proceedings "before the tribunal then having jurisdiction of such proceedings", and (3) if the parties did not agree upon a price and the lessee failed to institute such condemnation proceedings, then at a price of $300,000 (Appendix B, page 4a).

As long ago as 1920, Newport had constructed a penstock—a pipe—on the land covered by the lease, through which water was taken from behind Clyde Pond dam to Newport's generating station downstream. A second penstock was constructed on the same lands approximately ten years later (Appendix C, page 21a). Therefore, since before the lease of 1930, and continuously thereafter at all times material hereto, petitioner and its predecessor had maintained and operated these penstocks upon the lands here involved and had diverted water from flowing past them.

After the expiration of the lease on October 1, 1955, the parties were unable to agree upon a price to be paid for the property. On March 27, 1956, within the six month period provided therefor in the lease, petitioner instituted a condemnation proceeding before the Public Service Commission of the State of Vermont (Appendix B, page 4a).

On May 11, 1956, more than one month after the institution of petitioner's condemnation proceeding, respondents commenced an action against Citizens in the United States District Court for the District of Vermont. Respondents sought (1) to enjoin further prosecution of the condemnation proceeding before the Vermont Public Service Commission and (2) specific performance of that provision of the lease agreement requiring Citizens to pay $300,000 for their property if no condemnation proceeding was commenced before the appropriate tribunal. The foundation for that action was respondents' assertion that the Clyde River, adjacent to which respondents' lands were located, was navigable waters of the United States; that Citizens was required to apply for and obtain a Federal Power Commission license for its projects thereon; that Citizens had not done so, and that the State Public Service Commission therefore had no jurisdiction to condemn.

The District Court action was tried in November 1956. In April of 1957 the District Court made a decision which denied respondents the injunction they sought, but nevertheless made an original finding that the Clyde River was navigable waters of the United States; that Citizens should have had a license for its projects thereon from the Federal Power Commission; that it did not have such license; that navigability of the Clyde deprived the Public Service Commission of jurisdiction to continue with the condemnation proceeding pending before it; that, as a result, Citizens had failed properly to exercise its option of condemnation; and that, on that account, respondents were entitled to a decree for specific performance requiring Citizens to take the lands and pay respondents $300,000 for them. *Prouty* v. *Citizens Utilities Co.*, 150 F. Supp. 892 (D. Vt. 1957). In short, although Citizens was disqualified from acquiring the land by con-

demnation because it had no Federal Power Commission license to operate its project, its failure to have the license was no obstacle to requiring it to acquire the same land, for the same uses and purposes, pursuant to a judgment in a suit for specific performance.

In July, 1958, the aforesaid decree of the District Court was reversed by the United States Court of Appeals for the Second Circuit. That Court held that the Public Service Commission of Vermont, in the first instance, should have been permitted to determine its jurisdiction to entertain petitioner's application for condemnation; and that it was a violation of the rules of comity for the District Court to have made that determination in a collateral proceeding which, in effect, amounted to an injunction against the Public Service Commission, contrary to the provisions of Title 28 U.S.C., Sec. 2283. The Court of Appeals specifically noted that the Public Service Commission's determination of its own jurisdiction would be subject to review in accordance with Vermont statutes and, if a Federal question were involved, by possible review in this Court of a decision of the Supreme Court of Vermont. A copy of the opinion of the Court of Appeals is set forth hereinafter in Appendix D, pages 45a to 48a. Said decision is reported at 257 F. 2d 692 (2d Cir. 1958), cert. denied, 358 U. S. 867.

Up to the time of the making of the District Court's decree of specific performance, no agency of the Federal Government had taken any notice of petitioner's project on the Clyde River. Indeed, it was not until some three months after the District Court's decision that the Federal Power Commission for the first time instituted an investigation to determine whether or not the Clyde River was navigable waters of the United States (Appendix B, page 5a).

More than one year later, i.e., on February 16, 1959, the Federal Power Commission decided for the first time

that the Clyde River was navigable waters of the United States. It directed Citizens to apply to the Federal Power Commission for a license. The Commission's order did nothing more. It did not enjoin petitioner from maintaining and operating its project; it did not direct petitioner to remove any obstruction in the stream, and neither did it direct Citizens to halt its pending condemnation proceeding before the Vermont Public Service Commission.

On April 3, 1959, pursuant to application therefor, the Federal Power Commission made an order extending petitioner's time to file its application for license "• • • until 60 days after the issuance of a final mandate by the reviewing court" (21 F.P.C. 455; Appendix E, pages 50a to 51a). This extension order is of great significance. It is clear from that order that the Commission contemplated that Citizens would continue to operate the project in the meantime. This appears from the fact that the only condition imposed by the order was that Citizens should continue to

> "• • • release a minimum flow of 35 cubic feet of water per second through the sluice gate of its unit No. 11 diversion dam in the Clyde River from the date of the issuance of this order through June 30, 1959, and thereafter *each year* from April 1 through June 30, and during such additional period or periods as fish are spawning or migrating in the river below the unit No. 11 Division Dam." (Italics ours.)

Thus despite the fact that the Commission realized that a substantial period of time would have to elapse before "the issuance of a final mandate by the reviewing court," its order contained no direction that Citizens discontinue operating its project, or that it halt the pending condemnation proceeding before the Vermont Public Service Commission, in the meantime.

In April and December, 1959, the Vermont Public Service Commission held its hearings on petitioner's condemnation petition. In August, 1960 it granted the petition for condemnation and fixed the just compensation for the taking at the sum of $95,000, i.e., $205,000 less than the amount provided for in the contract between the parties in the event there was no condemnation (Appendix C, page 41a).

As of August, 1960, the date when the Vermont Public Service Commission made its decision (and it is this decision which was reversed by the decision of the Supreme Court of Vermont, here sought to be reviewed), petitioner was still prosecuting review proceedings of the Federal Power Commission's order of February 16, 1959. Thus, on May 24, 1960 the United States Court of Appeals for the Second Circuit decided Citizens' proceedings to review the Federal Power Commission's order. That Court held that the first mile of the Clyde River (adjacent to which none of petitioner's facilities was located) was navigable waters of the United States, and that the operation of plaintiff's facilities beyond that first mile "affected" the interests of interstate or foreign commerce in the otherwise navigable portion of the stream. On that limited ground only, and specifically leaving "open" the question of navigability of the remainder of the stream, the Court of Appeals made its affirmance. A copy of the Opinion of the Second Circuit is set forth in Appendix F, pages 52a to 56a). Said decision is reported at 279 F. 2d 1 (2d Cir. 1960), cert. denied, 364 U. S. 893.

Petitioner filed with this Court a petition for certiorari to review that determination of the United States Court of Appeals for the Second Circuit. That petition was denied in November, 1960. It will be recalled that the order of the Federal Power Commission of February 16,

1959 (Appendix E, pages 45a to 48a), by its terms, postponed until 60 days thereafter, i.e. until January, 1961, Citizens' obligation to file an application for license. It goes without saying that in April and December, 1959, when the Vermont Public Service Commission heard the condemnation proceeding, and in August, 1960, when it decided that proceeding, Citizens' time to apply for the license had not expired, and it was not operating, and there was no reason to assume that it would operate, in violation of any order of the Federal Power Commission.

Petitioner and respondents filed appeals from the Public Service Commission's decision to the Vermont Supreme Court. Petitioner challenged the finding of just compensation, alleging that it was excessive and that it was determined in accordance with erroneous principles of law. Respondent's appeal challenged, once more, the jurisdiction of the Vermont Commission.

ARGUMENT

POINT I

The Federal Power Commission's order merely directs Citizens to apply for a license to operate its project. Its order extending Citizens time to do so shows, by its terms, that it recognized that the extension might postpone Citizens' time to make the application for a period measured in years. In these circumstances, the failure of the Federal Power Commission to direct Citizens, in the meantime, to discontinue operations, or to halt its condemnation proceeding pending before the Vermont Public Service Commission, shows that there was no pre-emption of jurisdiction by the Federal Power Commission and, consequently, no ouster of the jurisdiction of the Vermont Public Service Commission to continue to its conclusion the condemnation proceeding then pending before it.

Respondents contended in the Court below

> "The contention of the petitioners before the Public Service Commission, and now here, is that the Public Service Commission has no jurisdiction because of the fact that the Clyde River is navigable and is subject to the jurisdiction of the Federal Power Commission." (Appendix B, page 4a).

The Vermont Supreme Court, in holding that the Vermont Public Service Commission was ousted of its theretofore existing jurisdiction in condemnation, stated:

> "In the instant case, the facility of the private corporation for which land is sought to be obtained

by eminent domain is upon a navigable stream. The Vermont Public Service Commission has no authority to authorize a project or facility upon a navigable stream over which the Federal Power Commission has assumed jurisdiction, and therefore has no jurisdiction to issue a certificate of public good which is the grant of such authority. Bellows Falls Hydro-Electric Corp., 114 Vt. 443.

"It must therefore follow that it is without jurisdiction to exercise the power of eminent domain by virtue of a certificate of public good, for the power of eminent domain is subordinate to, and dependent upon, the license to maintain the facility for which the land sought is to be condemned" (Appendix B, pages 11a to 12a).

There was, here, no question of the issuance of a certificate of public good. The Public Service Commission found that long before the Federal Power Commission's order Citizens had complied with all state conditions required for condemnation (Appendix C, page 25a), and the Vermont Supreme Court did not disturb that finding. The Vermont Supreme Court regarded the effect of the Federal Power Commission order, directing application for license, and that alone, as the obstacle to affirmance of the Public Service Commission's order. This appears from the statement:

"Despite the fact that its project might have been previously built under State authority, the order from the Federal Power Commission to obtain a license was required to be obeyed by the petitioner (Tuscarora Indian Nation v. Power Authority of N. Y., 257 F. 2d 885; Penn. Water and Power Co. v. F. P. C., 123 F. 2d 156).

"Where a federal agency or administrative body acts in a field permitted by a valid federal statute,

its authority is paramount to that of any state board or agency, and where a federal board assumes jurisdiction of a particular case after a state board has taken jurisdiction thereof, the state board's jurisdiction is ousted. **National Labor Relations Board** *v.* Eclipse Moulded Products Co., 126 F. 2d 576; 73 C.J.S. Public Administrative Bodies and Procedure, p. 378" (Appendix B, page 13a).

This foundation of the Vermont Supreme Court's decision was inapplicable on the facts. No Federal authority had assumed to take jurisdiction over the subject matter of the State proceeding, i.e., the condemnation of respondent's land. The Federal Power Commission had directed only that Citizens apply for a license to maintain its project, nothing more.

Furthermore the court below, in holding that the Public Service Commission was ousted of condemnation jurisdiction because of the existence of the Federal licensing power, cited no case construing the Federal Power Act to support this result. Indeed, the only case cited is *National Labor Relations Board* v. *Eclipse Moulded Prods. Co.*, 126 F. 2d 576 (7th Cir. 1942), a case involving the National Labor Relations Board. Appendix B, page 12a.

That case does not support the proposition for which it was cited. Indeed, *Eclipse* specifically states that until conflict or interference between two agencies, one Federal and one State, arises "* * * there is no choice to be made as to which shall be paramount." Here, no conflict had ever arisen between the Public Service Commission of Vermont and the Federal Power Commission with reference to condemnation, and condemnation was the only issue presented to, and decided by, the Public Service Commission.

Our research does not indicate the existence of a single case construing the Federal Power Act to hold that the

mere existence of a Federal Power Commission order to apply for a license *ipso facto* preempts to the Federal Power Commission exclusive and paramount jurisdiction over condemnation proceedings. *First Iowa Hydro-Electric Corp.* v. *Federal Power Commission*, 328 U. S. 152 (1946) does not so hold. There, the holding was specifically limited on its facts to a case where conflict necessarily had to arise, i.e., in relation to licensing of the same project by both the Federal Power Commission and a state agency. Indeed, *First Iowa* specifically points out that there are areas in which the Federal Power Act specifically contemplates that jurisdiction will continue to be exercised by the states. Thus, this Court said, at pp. 167-68:

> "• • • there is a separation of those subjects which remain under the jurisdiction of the States from those subjects which the Constitution delegates to the United States and over which Congress vests the Federal Power Commission with authority to act. To the extent of this separation, the Act establishes a dual system of control. The duality of control consists merely of the division of the common enterprise between two cooperating agencies of government, each with final authority in its own jurisdiction. The duality does not require two agencies to share in the final decision of the same issue."

Condemnation is one of the subjects which the Federal Power Act confirms may be left within the jurisdiction of the states. Title 16 U.S.C. 814 specifically so provides. There is not an indication in the Act that Congress intended that condemnation was to become exclusively a matter of Federal jurisdiction.

Acquiescence in the continued jurisdiction of State agencies is found in other provisions of the Federal Power

Act, as well, i. e., Title 16, U.S.C. Sec. 812 authorizing State agencies to fix rates up to the time the Federal Power Commission sees fit to fix them, and Title 16, U.S.C. Sec. 813 giving the States the right, until the Federal Power Commission undertakes to do so, to regulate and control the amount and the character of securities to be issued by a public utility otherwise subject to the Federal Power Act. Even more closely related to our present situation, which involves the right to continue a diversion of water (Appendix C, page 41a) is Section 821, which leaves unaffected

> "the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

Referring to the foregoing section, this Court in *First Iowa* 328 U. S. 152, said at page 178:

> "* * * In so far as those laws have not been superseded by the Federal Power Act, they remain as applicable and effective as they were before its passage."

We find in the Federal Power Act no allocation to the Federal Power Commission of jurisdiction in matters of condemnation of land privately owned, irrespective of where it is located or to what use it is to be put, and therefore we submit that what this Court said in *First Iowa*, reproduced above, is equally applicable here: matters of condemnation of lands remain within the jurisdiction of the States.

Moreover, the opinion of the Court below specifically held that the State Public Service Commission would have had power to continue the condemnation if petitioner was

in possession of a Federal Power Commission license for its project.

The learned Supreme Court of Vermont cited the *Bellows Falls* case, 114 Vt. 443 (1946), for the proposition that the State Public Service Commission may not "authorize" a project or facility on a navigable stream over which the Federal Public Commission has assumed jurisdiction (Appendix B, pages 11a and 12a). Here, however, no question of the "authorization" of a project or facility was involved: nothing new was to be initiated; nothing was to be created; there was involved only the effectuation of the method agreed upon by the parties for the fixation of the price of a tract of land which would continue to be used for the purpose for which it had been in continuous use for upwards of 30 years.

It is respectfully submitted that the rationale underlying the doctrine of pre-emption or paramountcy is totally inapplicable in this case. Condemnation by the Vermont Public Service Commission could not interfere in the slightest with the exercise by the Federal Power Commission of the powers and remedies conferred upon it by statute. In fact, a reading of the Federal Power Act clearly shows that it is in no wise concerned with "ownership" of property: it provides only for prohibitions against maintenance and operation of projects without its permission. Condemnation does not impinge upon, or interfere with, that power.

POINT II

The learned Vermont Supreme Court erred (1) in treating the Federal Power Act as authorizing a state court to determine that a party before it in a private litigation stood in violation of an order of the Federal Power Commission, even though the Commission had not made any such finding, and, on the basis of such determination, to deny a party relief to which, undisputedly, it would otherwise be entitled; and (2) in interpreting the Federal Power Act as investing a private litigant with the right to defeat a claim made against him in a private litigation on the ground that his adversary had not complied with an order of the Federal Power Commission.

Respondents persuaded the Vermont Supreme Court that petitioner was violating the Federal Power Act by operating its project without a Federal Power Commission license, and for that reason was divested of the right to acquire their lands by condemnation as provided for in the lease between the parties.* By so doing, respondents raised, and the Vermont Supreme Court decided, a matter entrusted by statute to the initial determination of the Federal Power Commission alone. Not only has the Federal Power Commission not made any such determination, but it has not even asserted that to be the fact.

In any event, the Federal Power Commission has primary and original jurisdiction over all such matters, and it was error for the Vermont State Court even to enter

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*Quite inconsistently, the alleged violation was claimed by respondents to be no obstacle to requiring petitioner to take the same land, for the same purposes, pursuant to a judgment for specific performance at upwards of three times the value fixed in the condemnation proceeding.

tain, much less sustain, as a defense in a purely private litigation, a claim that a party had failed to comply with a Federal Power Commission Order. The doctrine has been applied specifically to the Federal Power Act, *Interstate Nat. Gas Co. v. Southern Cal. Gas Co.*, 102 F. Supp. 685 (D.C. Cal. 1952); followed by *Interstate Nat. Gas Co. v. Southern Cal. Gas Co.*, 103 F. Supp. 317 (D.C. Cal. 1952), aff'd. 209 F.2d 380 (9th Cir. 1953); *Federal Power Commission v. Arkansas Power & Light Co.*, 330 U. S. 802 (1946); *Michigan Consol. Gas Co. v. Panhandle Eastern Pipe Line Co.*, 173 F.2d 784 (6th Cir. 1946).

The doctrine has been applied to orders of the Interstate Commerce Commission, the United States Shipping Board, the Federal Maritime Board, the Federal Communications Commission, the Civil Aeronautics Board and other agencies. *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1907); *United States Nav. Co., Inc. v. Cunard S.S. Co. Ltd.*, 284 U. S. 474 (1932); *Far East Conference v. United States*, 342 U. S. 570 (1952); *Stenger v. Stenger Broadcasting Corp.*, 28 F. Supp. 407 (D.C. M.D. Pa. 1939); *Adler v. Chicago & Southern Air Lines, Inc.*, 41 F. Supp. 366 (D.C. Mo. 1941).

In *United States v. Western Pac. R.R.*, 352 U. S. 59 (1956) this Court said (at page 64):

> "'Primary jurisdiction' . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body . . ."

In *Interstate Natural Gas*, 103 F. Supp. 317 (D.C. Cal. 1952) plaintiff claimed that a defendant, in violation of Federal laws, had denied plaintiff the use of a pipeline belonging to one of the defendants. The complaint alleged

that the pipeline was a common carrier and this allegation (like the allegation of "navigability" here) was the asserted basis for recovery (209 F. 2d. at 383). The Court held that primary administrative jurisdiction over a common carrier was in the Federal Power Commission; that the plaintiff had failed to avail itself of its administrative remedies, and the action was therefore required to be dismissed for lack of jurisdiction of the subject matter (209 F. 2d. at 384-385).

Plaintiff argued in *Interstate Natural Gas* that the Federal Power Commission was deprived of its otherwise primary administrative jurisdiction because defendant had violated the provisions of the Natural Gas Act. The Court rejected the argument. It held that the administrative remedy was exclusive, at least until the Commission had passed upon the validity of the practices complained of. Finally, the Court in *Interstate Natural Gas* held that the thrust of the principle of primary administrative jurisdiction could not be avoided by a plaintiff's claim of damage resulting from the alleged private actions of the defendants. The unavoidable predicate for a finding of such damage was adjudication by the Court on matters which were within the jurisdiction of the Commission. That necessary preliminary determination ousted the Court of jurisdiction.

The applicability of this principle to the case at bar is plain. The Federal Power Commission is entrusted by the Federal Power Act with the responsibility for determining "navigability" as defined by the Act (Title 16 U. S. C. Sections 796(8), 797(g), 817). It is also charged with enforcement of licensing provisions of the Act. Instances where the Federal Power Commission, on its own initiative, has commenced proceedings to compel an application by a utility for Federal Power Commission license are

not unusual. *Montana Power Co. v. Federal Power Commission*, 185 F. 2d 491 (D.C. Cir. 1950); *Wisconsin Public Serv. Corp. v. Federal Power Commission*, 147 F.2d 743 (7th Cir.) 1945), cert. denied 325 U. S. 880; *Pennsylvania Water & Power Co. v. Federal Power Commission*, 124 F.2d 455 (D.C. Cir. 1941), cert. denied, 315 U.S. 806.

Related to the violation of the rule of primary jurisdiction, is the fact that the decision below permits respondents, as private parties in a private litigation, to raise a question of public importance in reference to which their interest is no different from that of any other member of the public at large.

Where a Federal statute purports to deal comprehensively with a subject of Federal regulation and provides by whom the provisions of the statute shall be enforced or violations redressed, it has uniformly been held that persons outside of classes specifically enumerated may not procure determinations within the ambit of the statute.

The Federal Power Act is such a statute.

Title 16 U.S.C., Section 797(g) authorizes the Commission to initiate investigations concerning compliance with the Act. Section 820 of the same Title authorize the Attorney General, under certain conditions, to institute equity proceedings in the District Court, for the purpose of remedying by injunction, *mandamus* or other process any act of commission or omission in violation of the provisions of the Act or of any lawful regulation or order promulgated thereunder. Section 825 of the Title provides for complaints to the Commission by other Commissions, municipalities, state or *private persons*. Section 825f provides for investigations by the Commission. Section 825m authorizes the Commission to bring action in a District Court to enjoin practices which will constitute violations of the Act. Finally, under Title 33 U.S.C. Sections

406 and 413 there are provisions authorizing the institution of certain civil and criminal suits in connection with river and harbor improvements, waterways and the like.

None of the sections referred to above, or any other in the Act, confers a right upon respondents to raise, litigate and have determined by the Vermont Supreme Court the question of whether petitioner was or was not maintaining its project on the Clyde River in accordance with the Federal Power Act, and, on the answer to that question, predicate a judgment relieving respondents of their contractual obligations. Yet, this is the underlying ground for the Court's reversal of the decree of the Public Service Commission.

In doing that, we submit, the Vermont Supreme Court exceed the power left to it by the Federal Power Act.

The public interest in the enforcement of the requirements of these statutes precludes private litigation of such public rights. *Amalgamated Clothing Workers* v. *Richman Bros. Co.*, 348 U. S. 511 (1955); *Johnson* v. *Chesapeake & Ohio Ry.*, 188 F.2d 458 (4th Cir. 1951), cert. denied, 342 U. S. 843; *Mowtchock* v. *Givens*, 180 F.2d 221 (C.A. 7th, 1950); *Connor* v. *South Carolina Public Service Authority*, 91 F. Supp. 262 (D.C. S.C., 1950).

In *Johnson*, the Court clearly expressed the rationale underlying its decision. It stated, at page 458:

> "'But to allow any private interest to thresh out the complicated questions that arise out of §1 (18-22) — as, for instance, whether a proposed construction is an 'extension' or a 'spur', • • • is to invite dislocation of the scheme which Congress has devised for the expert conduct of the litigation of such issues. It also would put upon the district courts the task of drawing fine lines in determining when a private claim is so special that it may be set apart from the general public interest and give

> the claimant power to litigate a public controversy. These inquiries are so harassing and unprofitable, as to be avoided, unless Congress has explicitly cast the duty upon the courts. Against any such implication, in the absence of rather plain language, the whole course of federal railroad legislation and the relation of the Interstate Commerce Commission to it admonishes. The interests of merely private concerns are amply protected even though they must be channelled through the Attorney General or the Interstate Commerce Commission or a state commission."

The *Conaon* case specifically applied the same principle to the provisions of the Federal Power Act.

We respectfully submit that the importance of the questions raised by this Petition far transcends the issue whether the Vermont Supreme Court was correct or incorrect in its decision here sought to be reviewed. If the Vermont Court was right in construing the Federal Power Act to make the order of the Federal Power Commission an automatic ouster of the jurisdiction of the Vermont Public Service Commission to continue the condemnation proceeding then pending before it, then anyone whose lands were duly taken by a Public Service Company by condemnation under State authorization would have the right to challenge the validity of the taking at any time in the future that the Federal Power Authority might decide to exercise licensing authority over the Public Service Company. This consequence is implicit in the holding of the Vermont Court, for it retroactively vitiates the propriety and effectiveness of orders duly and properly made by state agencies at times when no assertion of Federal jurisdiction had been made. Furthermore, it permits private parties to intermeddle in matters and affairs entrusted by federal statute solely to the direction

of the Federal Power Commission, and to procure results which are not only not contemplated or sought by the federal agency, but which, indeed, are entirely contrary to any action taken by the agency.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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Attorneys for Petitioner.

Office Supreme Court
FILED

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 731

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

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Appendix A

STATE OF VERMONT

SUPREME COURT

Montpelier, Vermont
Nov. 21, 1961

To:

Clerk, Public Service Commission,
Montpelier, Vt.

Reporter of Decisions, F. A. Bosworth, Esq.,
Middlebury, Vt.

And to Counsel as follows:

C. G. Parker, Esq., Morrisville, Vermont
Arthur Graves, Esq., St. Johnsbury, Vermont
Edwin W. Lawrence, Esq., Rutland, Vermont.

Re: 1910, Citizens Utilities Co. *v.* Prouty et als (Wash.)

Gentlemen:

Please be advised that the Supreme Court has this day made the following entry in the above-entitled case. A copy of the opinion is this day being forwarded to the Reporter of Decisions and to State Library, Montpelier, Vermont:

> Judgment order of the Public Service Commission, dated Nov. 10, 1960, purporting to authorize the petitioner, Citizens Utility Co. to condemn and to acquire the petitionee's property is reversed for want of jurisdiction. Let the result be certified to the Public Service Commission. November 21, 1961.

IN WITNESS WHEREOF, I hereto set my hand and affix the seal of said Supreme Court at Montpelier, in the County of Washington, this 21st day of November A. D. 1961.

NORMAN E. PORUZZI
Clerk.

(SEAL)

Appendix B

SUPREME COURT

WASHINGTON COUNTY

September Term, 1961 — No. 1910

CITIZENS UTILITIES CO.
(Newport Electric Div.)

v.

CHARLES T. PROUTY ET ALS.

Present: HULBURD, C. J., HOLDEN, SHANGRAW, BARNEY and SMITH, JJ.

SMITH, J. This is a joint appeal by petitioners and petitionees from an order of the Public Service Commission granting to the petitioner, in accordance with its petition for eminent domain, title to certain real estate, owned by the petitionees, located on both sides of the Clyde River, in the City of Newport, Vt., and awarding compensation to the petitionees for such taking.

The petitioner is a Delaware corporation, licensed to do business in the State of Vermont, and is a public service company operating and carrying on the business of supplying electric power and energy to consumers of various kinds in Essex, Orleans, Franklin and Grand Isle counties in the State of Vermont.

The petitionees are the owners of lands situated on the banks of the Clyde river and are the successors in title to Abbie D. Prouty, now deceased.

The petitionees in their appeal to this Court have denied jurisdiction of the Vermont Public Service Commission to

condemn lands owned by them under the eminent domain proceedings brought by the petitioner before the Commission. The petitioner, on its part, brings its appeal here because of claimed error on the part of the Vermont Public Service Commission in its determination of the fair market price of the land which the petitioner has been ordered to pay to the petitioners under the order of the Commission.

The jurisdictional question presented by the petitioners is the paramount one for our consideration, for if jurisdiction is lacking in the Public Service Commission then the entire order is of no force and effect.

The Clyde river rises in the northeastern part of Vermont and empties into Lake Memphremagog at Newport. Upon this river the petitioner has built hydroelectric dams at several places including the outlet of Seymour Lake and Echo Pond, and also across the river at West Charleston and at Clyde Pond. The water from the Clyde Pond storage reservoir is conveyed by steel penstocks to the powerhouse of the petitioner at Newport. These penstocks are located upon the land of the petitioners, and it is this land that the petitioner seeks to acquire by the proceedings in eminent domain before the Public Service Commission. The total area of the land is about 5.4 acres, and it lies for about 700 ft. on both sides of the Clyde river between the Clyde Pond dam and the Newport powerhouse.

The owner of these lands in 1930 was one Abbie D. Prouty. A lease was entered into in that year between Abbie D. Prouty and the Newport Electric Company, the petitioner's predecessor, for a twenty-five year period, at a yearly rental of $7,500, plus taxes. An option to pur-

chase the land for $150,000, expiring Oct. 1, 1935, and contained in the lease, was not exercised by the petitioner.

Under the terms of the lease, the option not having been exercised, there was an agreement that at the expiration of the lease the lessor would sell, and the lessee would buy the land at a mutually agreeable price. In the event they could not agree upon a price, then the lessee was to bring condemnation proceedings "before the tribunal then having jurisdiction", within six months from the expiration date. If the lessee failed to bring such proceedings then it was to pay to the lessor $300,000 for the land described in the lease.

The parties did not agree upon a price for the land and the lessee brought this condemnation proceeding before the Public Service Commission within the six months' period, on March 21, 1956.

The contention of the petitionees, before the Public Service Commission, and now here, is that the Public Service Commission has no jurisdiction because of the fact that the Clyde river is navigable and is subject to the jurisdiction of the Federal Power Commission.

The petitionees on May 11, 1956, sought an injunction to prohibit further proceedings before the Public Service Commission, in the United States District Court in Vermont. The United States District Court refused the injunction, but found the Clyde River to be a navigable stream and granted judgment for $300,000 to the petitionees here. Upon appeal from the District Court, the United States Court of Appeals for the Second Circuit reversed the District Court and indicated that the question of jurisdiction was properly an issue for the Public Service Commission, itself, to determine. Prouty et al v. Citizens Utilities Company, 257 F. 2d 692.

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The Federal Power Commission started an investigation into the matter of the navigability of the Clyde river on June 24, 1957. An order was issued from the Federal Power Commission on Feb. 16, 1959 directing the petitioner to apply for a license under the Federal Power Act for the continued operation and maintenance of its projects consisting of a Unit No. 11, Newport and Charleston hydro-electric developments and the Seymour Lake and Echo Pond dams. In the opinion upon which its order was based the Federal Power Commission found the Clyde river to be navigable from its sources to Lake Memphremagog.

An appeal from the opinion and order was taken by the petitioner to the United States Court of Appeals, 2d District. On May 24, 1960, in an opinion written by Judge Learned Hand, the United States Court of Appeals for the Second Circuit, affirmed the order of the Commission. The opinion stated that the last mile of the Clyde river was navigable, left the question of how much of the Clyde river above the one mile was navigable "open", but did find that all of the petitioner's dams on the Clyde river "affected" the navigability of the last mile. Citizens Utilities *v.* F.P.C. 279 F. 2d 1.

The order of the Public Service Commission was filed on Nov. 10, 1960. The report of the Commission indicates its knowledge of the order of the Federal Power Commission and of the decision of the United States Court of Appeals, 2nd District, affirming that order. The report also states that the petitioner does not have the license under the Federal Power Act which it was ordered to obtain by the Federal authorities.

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The Public Service Commission decided that the petition before it, which asks for the condemnation of land between a power plant and a dam, and over which land penstocks carry water from dam to powerhouse, was governed by the revisions of 30 V.S.A. §111 (1). This section provides:

> "When the Commission finds, in the case of dams, that a certificate of public good authorizing the project as herein required, or a license from the Federal Power Commission has been granted:"

that the Commission then has authority to proceed with the petition for condemnation of land by eminent domain.

The jurisdiction of the Public Service Commission is limited to "dams and projects that relate to or are incident to the generation of electric energy for public use." 10 V.S.A. §701 (a).

Referring again to 30 V.S.A. §111 (1), in Sec. 115 of 30 V.S.A., it is provided "without limiting or enlarging the scope of Sections 109-114 of this title, it is hereby specifically provided that they shall apply to the condemnation of rights to construct and maintain pipe lines, conduits, lines of poles, towers or wires, and to rights to appropriate, divert and flow back water." We therefore agree with the Public Service Commission that the dam and powerhouse with which this land is associated must be authorized under Section 111 (1) of 30 V.S.A.

The certificate of public good mentioned in 30 V.S.A. §111 (1) is issued by the Public Service Commission after a hearing on a proposed project and a determination by the Commission that the proposed project is for the benefit of the people of the State of Vermont. 10 V.S.A.

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§706. The petitioner has no certificate of public good in the instant case, but it is the position of the Commission that it may dispense with this requirement because most of the original project here involved was constructed before such a certificate was made a necessity for proceedings in eminent condemnation in the case of dams (1945).

The petitioners have briefed their exceptions to this waiver on the part of the Commission of the possession of a certificate of public good, but it is the lack of a license from the Federal Power Commission on which their principal objection to jurisdiction is made, and to this we turn our immediate attention.

The Public Service Commission has stated in its report that the portion of the Clyde river herein involved has not been declared to be navigable, but that if the river was navigable, and a license required of the petitioner, it would still have jurisdiction of the matter.

The United States Court of Appeals for the Second Circuit stated:

> "Since there can be no doubt that the last mile of the river is 'navigable' without change the only question is whether the amount of water by which the petitioner can vary its flow affects that part of the river enough to give the (Federal Power) Commission jurisdiction over the granting of a license."

In affirming the order of the Federal Power Commission requiring an application for a license on the part of the petitioner, Judge Hand declared:

> "Concluding as we do that all the petitioner's dams on the Clyde river do 'affect the navigability' of the last mile of that river it becomes unnecessary for us to decide how much, if any, of the river above Unit No. 11 is 'navigable'."

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What the Federal Court has said here is that it is unnecessary to determine whether the Clyde river, above the last mile, is navigable, because the flow of such upper part of the river has a direct effect upon that part declared to be navigable, and thus any projects upon this upper part of the river were under the jurisdiction of the Federal Power Commission. This is borne out completely by the fact that the order requiring the petitioner to obtain a license (which was affirmed) included the Clyde river dam, with which we are concerned, as well as two others even more distant up the stream.

The licensing power of the Federal Power Commission is set forth in the first sentence of Section 23, 16 U. S. C. 817:

> "It shall be unlawful for any person, state or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories) or utilize the surplus water or water power from any government dam, except under and in accordance with the terms of a permit or valid existing right of way granted prior to June 10, 1920, or a license granted pursuant to this chapter."

The next sentence of Section 23, U. S. C. 817 applies to waters other than navigable waters over which the Congress has jurisdiction and makes the same licensing requirement. The case of Georgia Power Company v. Federal Power Commission, 152 F.2d 908, cited by Judge Hand with approval in the Citizens Utilities Company v. Federal Power Commission case (supra), states:

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> "We fully agree with the Fourth Circuit that one of the purposes of the Water Power Act was to authorize the Commission to license dams in navigable water of the United States in lieu of an Act of Congress, and in our opinion one of the purposes of Section 23 was to likewise take care of the case of a proposed structure in a non navigable tributary of an interstate navigable stream."

See also the recent case of U. S. v. Grand River Dam Authority, 363 U. S. 229, in which the power of flood control of the United States was held to extend to the tributaries of a navigable stream.

The Vermont Public Service Commission, before its decision, thus was faced with a petitioner asking it to condemn land in connection with a project under the jurisdiction of the Federal Power Commission but without the petitioner having the license required under the Federal Power Act to operate and maintain the project in furtherance of which the petitioner sought to acquire the land.

Troublesome, in this connection, was the fact that the petition for condemnation had been entered before the Public Service Commission at a time prior to the assumption of jurisdiction over the project by the Federal Power Commission, and its order that a license be obtained. Because, while the Public Service Commission still had the matter under consideration, it was presented with the fact of jurisdiction of the Federal Power Commission over the project, and of the failure of the petitioner to obtain the required license. These facts were noted in its report and order.

The Public Service Commission met the problem head-on by declaring that it retained jurisdiction over the con-

demnation proceedings even if the Clyde river was navigable, and despite the fact that the petitioner was without the license made mandatory by the order of the Federal Power Commission.

The Public Service Commission cites in support of its position that 16 U.S.C. 814 allows a licensee of the Federal Power Commission to seek condemnation in a state court. It also cites the case of **Oakland Club v. South Carolina Public Service Commission**, 110 F.2d 84 as further support for authority that a licensee, at its option, may proceed in a state court for condemnation proceedings.

The petitioner, in its brief supporting this ruling of the Public Service Commission, cites to us the cases of **Harris v. Central Nebraska Public Service Power and Irr. District**, 29 Fed. Supp. 425 and **Burnett v. Central Nebraska Public Power Irr. District**, 23 N.W.2d 661 as authority that a licensee may use a state court in eminent domain procedure for the condemnation of land. The case of Superintendent of Public Works v. Paonesso, 14 Misc. (N.Y.) 2nd 787, a decision of an inferior court of the State of New York, is one upon which the petitioner places considerable reliance. But this case also has to do with a holder of a federal license and its holding is that an agency of the state which accepts a federal license may proceed either under the state's own power of eminent domain, or under the federal license. But the petitioner here is neither an agency of the State, nor is it a federal license holder, although under order to obtain such a license.

A private corporation has no right to eminent domain in the absence of a delegation of such power to it from

the sovereign by virtue of constitutional or statutory provisions. 29 C.J.S. Eminent Domain p. 12. See George v. Consolidated Lighting Co., 87 Vt. 111. The statutory provision of 30 V.S.A. 111 (1) grants the right of eminent domain to a private corporation before the Public Service Commission provided that such corporation has a certificate of public good from the State, or a license from the Federal Power Commission. The certificate of public good is the vehicle by which the State of Vermont delegates the right of eminent domain to a private corporation, just as the license from the Federal Power Commission serves as the delegation of such power on the part of the United States.

The issuance of a certificate of public good by the Public Service Commission is a determination that the project for which the certificate is granted is in the public interest of the State of Vermont. George v. Consolidated Lighting Co., 87 Vt. 411. The granting of a license for a project by the Federal Power Commission is an affirmative determination by that body that the project so licensed is in the interest of the United States.

In the instant case the facility of the private corporation for which land is sought to be obtained by eminent domain is upon a navigable stream. The Vermont Public Service Commission has no authority to authorize a project or facility upon a navigable stream over which the Federal Power Commission has assumed jurisdiction, and therefore has no jurisdiction to issue a certificate of public good which is the grant of such authority. Bellows Falls Hydro Electric Corp., 114 Vt. 443.

It must therefore follow that it is without jurisdiction to exercise the power of eminent domain by virtue of a

certificate of public good, for the power of eminent domain is subordinate to, and dependent upon, the license to maintain the facility for which the land sought is to be condemned.

The license to maintain a facility upon a navigable stream must come from the Federal Power Commission. Bellows Falls Hydro Electric Corp., 114 Vt. 443, 448.

At the time the petitioner filed its petition for condemnation it was under no order to obtain a license to maintain the project for which it sought the land. It would even appear from the record before us that the project for which the land was sought had been completed and in operation before the petitioner became subject to the Federal licensing requirement. But during the pendency of the petition before the Public Service Commission, and prior to its determination of the questions presented to it there came about a change in both the factual and legal situation presented for its consideration.

The Commission was confronted with the fact that the Clyde river, at the point where the project was situated, had been determined to have an effect on a navigable stream, and was under the jurisdiction of Congress. It was also confronted with the situation that a license must be obtained by its petitioner from the Federal Power Commission to legally maintain its project for which it sought to condemn land, and to confer upon it the right of eminent domain.

Despite the fact that its project might have been previously built, under State authority, the order from the Federal Power Commission to obtain a license was required to be obeyed by the petitioner. The Seneca Indian

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Nation v. Power Authority of N. Y., 257 F. 2d 883. Penn. Water and Power Co. v. F. P. C., 123 F. 2d 155.

Where a federal agency of administrative body acts in a field permitted by a valid federal statute, its authority is paramount to that of any state board or agency, and where a federal board assumes jurisdiction of a particular case after a state board has taken jurisdiction thereof, the state board's jurisdiction is ousted. National Labor Relations Board v. Eclipse Moulded Products Co., 126 F. 2d 576; 73 C.J.S. Public Administrative Bodies and Procedure, p. 378.

No question would be presented here if the petitioner had seen fit to secure the license it is under order to obtain by the Federal Power Commission. Jurisdiction to condemn the land sought would be vested in the Public Service Commission by 30 V.S.A. §111 (1) as well as by 16 U.S.C. §817.

Without the license the Public Service Commission lacks the proof of authorization of the project required by 30 V.S.A. §111 (1) which is necessary for jurisdiction of the eminent domain proceedings brought by the petitioner.

The judgment order of the Public Service Commission, dated Nov. 10, 1960, purporting to authorize the petitioner, Citizens Utility Company, to condemn and to acquire the petitioners' property upon the payment of $93,000.00 is reversed for want of jurisdiction. *Let the result be certified to the Public Service Commission.*

Appendix B

SUPREME COURT

WASHINGTON COUNTY

September Term, 1961

No. 1910

CITIZENS UTILITIES CO.
(Newport Electric Div.)

v.

CHARLES T. PROUTY ET ALS.

BARNEY, J. (Concurring) Valid exercise of the power of eminent domain by an eligible private corporation requires full compliance with the statutory prerequisites. Strict construction of the terms of delegation of this power is the rule, since attributes of sovereignty overriding private property rights may not be casually exercised.

30 V.S.A. §111(1) permits the right of eminent domain to be invoked in connection with a power dam only by the holder of a certificate of public good for the project, or by the holder of a license from the Federal Power Commission. This utility admits that it has no federal license. The exercise of eminent domain must then be justified under a certificate of public good. However, the record demonstrates that the utility has no such certificate.

The public service commission's attempt to supply this lack by resort to a sort of "grandfather clause" technique has no support in the statute. Construction of the dam

prior to the enactment of the statute requiring a certificate of public good authorized and sustains its presence in the Clyde River under state law. However, this does not overcome the statutory demand that resort to eminent domain powers after the enactment of 30 V.S.A. 111(1) requires either a state certificate or a federal license.

The statute contains no exceptions. The inference is that the legislature wished the "public good" examined before eminent domain is exercised in connection with dams. Neither the public service commission nor the parties have any authority to dispense with the specified prerequisites, however small the proposed exercise of sovereignty. No more can the parties contract away the specific statutory requirements.

The parties have chosen to have recourse to the eminent domain procedure. They are bound to abide by its terms. In this case they have not qualified as authorized users of the power to condemn in either of the modes provided by the statute. The jurisdictional basis for the action of the public service commission is therefore lacking.

Although the case of In re Bellows Falls Hydro Elec. Corp., 114 Vt. 443, is indicative of the consequences of the entrance of the Federal Power Commission into the area through a navigability determination, the question of conflicting jurisdiction is not reached in this view of the matter.

For these reasons I concur with the conclusion of the majority that the jurisdictional basis for the action of the public service commission fails.

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SUPREME COURT
WASHINGTON COUNTY
September Term, 1961
No. 1910

CITIZENS' UTILITIES CO.
(Newport Electric Div.)

v.

CHARLES T. PROUTY ET ALS.

HULBURD, C.J., (Dissenting) Eminent domain, in any real sense, is not involved here. The plaintiff already has a contract right to the land in question. These proceedings are essentially *pro forma* pursuant to the agreement of the parties. Our statute (30 V.S.A. §110) is broad enough to permit condemnation proceedings where a contractual right exists. The corresponding federal statute (16 U.S.C. §814) is not.

This is not a proceeding to acquire land for a dam or other construction. The construction has already been done at a time prior to the enactment of any requirement for a certificate of public good. Accordingly, the public service commission has found that the plaintiff possesses all the authorization needed under 30 V.S.A. §111(a). The opinion of the majority does not rest on any error growing out of this finding. As the case stands, it is as if we have a plaintiff, possessing a certificate of public good, which petitions the public service commission for condemnation in connection with a contract as to land on a stream which has not previously been determined to be navigable. The question is whether the Federal Power

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Commission by coming on the scene later with its declaration that the Clyde River is navigable necessarily ousts the public service commission of its jurisdiction. I believe that the state commission having properly entered upon hearing the petition, retained jurisdiction to complete what it had started to do. My reason for so holding would be that there is nothing in the nature of what was sought to be done which could possibly be in opposition to any federal interest. The matter was concerned not with the initiation of a project but with the culmination of a contract under which land is inevitably to be acquired, federal license or no federal license. I am unwilling to assume that proceedings before a state public service commission, with their attendant expense, must automatically come to a dead-end in the circumstances presented by this case. Any "dual system involving the close integration of these powers" can not be said here to be running into "a futile duplication of two authorities over the same subject matter." First Iowa Hydro-Electric Coop. v. Federal Power Commission, 328 U.S. 152, 171. I am unwilling to say that state-federal relations have degenerated to a point where the jurisdictions of the two cannot coexist in a situation of the sort presented to the commission. At least I am disposed to wait until we have been told so before accepting this conclusion.

In view of the concurring opinion, I cannot leave the question with what has been said.

It is always desirable to keep before us basic concepts. One of these is the Legislature's intent which lies behind a given statutory requirement. Here we are concerned with a certificate of public good. It seems clear that what the Legislature intended was this: private property ought not to be taken from a man in the name of the sovereign,

i.e., the public, unless the public good is going to be served. To take a man's property against his will, in the name of the public, where no public good demands it, would be the worst kind of tyranny. It follows that where the land owner, by his own contract has freely bound himself to convey the land in question, all reason for establishing public good has disappeared. Here we have a dam with its appendage, that is, the penstock leading from it, which have been constructed long before the "public good statute" was enacted. The concurring opinion concedes that the existence of the dam and penstock is "secure"; in other words, it is as if they were there by virtue of a certificate of public good, but that this security does not extend to the land which underlies them, even though the utility, long before the public good statute, acquired, by contract, a right to own that land. I am unwilling to give the defendant landowners the benefit and protection of a position which has been bargained away by them. One asks: What is there to hold a public good inquiry on? The dam and penstock are there; secure; conveyance of the land has been promised by contract. To say that the public service commission sought to proceed on "a sort of 'grandfather clause' technique" is not sufficiently comprehensive. Having taken judicial notice of its records showing a long course of recognition of the utility and its operations—something which is not at hand for this Court—the public service commission's position may be supported on the broad ground that in view of the contract which antedated the public good statute, it would be a meaningless insistence on a useless act to make a formal public good certificate a prerequisite for the proceeding involved in this case. The legislative objective has already been satisfied.

Appendix C

STATE OF VERMONT

ORLEANS COUNTY, ss.

CITIZENS UTILITIES COMPANY (Newport Electric Division) v. CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELEANOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY	Public Service Commission No. 2742

REPORT

(of Public Service Commission dated August 26, 1960)

This case involves the determination of the value for eminent domain purposes of about 5.4 acres of land about 700 feet long on both sides of the Clyde River. The land involved is situated in the City of Newport, County of Orleans and State of Vermont between the Clyde Pond Dam and storage reservoir owned by Petitioner and Petitioner's power house, the Petitioners' land being 300 feet from the Pond, and Petitioners' power house being about 900 feet from the land in question. Permanently installed steel penstocks crossing Petitioners' land help to convey water from the dam to the power house and the only practical route to conduct water from the dam to the power house is over Petitioners' land. Moreover, about one half of the 140.14' fall from the dam to the power house is on the Petitioners' land. The generating station, thus using the fall of the Clyde River and Petitioners' premises, contain three generating units, and

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has 3600 KW of installed capacity; they produced in calendar year 1957 over 14 million KWH and in 1958 over 16 million KWH.

Historically, the Clyde Pond Dam was built in 1921 or 1922; one long penstock 5 feet in diameter leading from a now unused dam on Petitioners' premises to the power house was extended upstream to the Clyde Pond Dam in 1940; the other longer penstock, 6 feet in diameter, crosses only 225 feet of Petitioners' land. The effective head at the main station was less in 1931 than in 1956, 107' as against 140-143 and this increase has resulted in increased generating capacity to Petitioner. There is no practicable method of utilizing the fall without crossing Petitioners' land.

The premises in question were conveyed on July 29, 1930, effective October 1, 1930, by Petitioner's predecessor in title Newport Electric Light Co., to Petitioners' predecessor, one Abbie D. Prouty, and on the same day leased back from Buyer to Seller for 25 years at a rental of $625 per month plus taxes or $7,500.00 plus taxes per year, subject to an option to purchase for $150,000.00 expiring on October 1, 1935 and not exercised, and containing a binding purchase and sale agreement that within 6 months after the expiration of the lease, the Lessee would sell and the Lessor would buy at a mutually satisfactory price or, if the price could not be agreed upon, at a price to be determined by condemnation proceedings brought within such six months period "before the tribunal then having jurisdiction" or if such proceedings were not brought at a price of $300,000. Petitioner instituted a condemnation petition before this Commission within the required period. Petitioners contest the jurisdiction of this Commission, claiming that the Clyde River is navigable and hence subject to the jurisdiction of the Federal Power Commission.

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On May 11, 1956, Petitioners instituted an action in the U.S. District Court in Vermont seeking an injunction to prohibit further proceedings in this eminent domain proceeding and further sought a decree for specific performance of the lease purchase agreement, requesting a judgment for $300,000.00. The District Court, in 150 Fed. Supp. 892, refused the request for the injunction but did find the Clyde River navigable and granted judgment for $300,000.00. This decision was appealed to the 2nd Circuit Court of Appeals. The appellate Court held that the granting of this judgment would be a violation of the spirit of federal state cooperation, since it would have the same effect on the granting of an injunction against state jurisdiction. As a result, it reversed the District Court and indicated the question of jurisdiction was properly an issue for this Commission to determine. See *Peconta et al vs Citizens Utilities Company*, 257 Fed. (2nd) 692.

The Petitioners filed on a plea to the jurisdiction of this Commission to determine this matter. The Commission held and does hold now that it has the jurisdiction to make an award whether or not the Clyde River is navigable. Actually, in *Citizens Utilities vs FPC*, 279 Feds. (2nd), an appeal from a decision of the FPC which held the whole Clyde River to be navigable, the Circuit Court of Appeals held that the Citizens' dams were capable of affecting the flow of water in the river below so-called Unit #11 but left open how much of the river above Unit #11 which would include the premises in question was navigable. Therefore, Citizens Utility Company was ordered to seek a license for Unit #11 on this limited ground.

Thus, the case now stands no different than it did when this petition was filed. The portion of the Clyde River herein involved has not been declared to be navigable. It

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the Statute (Federal Power Act) as a complete statute of eminent domain, which would serve to exclude the rights of the Condemnor under a state law, we are convinced that this Statute would have been far more complete and would have included many provisions which are omitted." See also *Sage v. Public Service Commission* (1968) 182 N.Y.S. 2d 223, to the same effect. To hold that a utility must wait to have the Federal Power Commission declare a river navigable and must secure a license before it can proceed to seek eminent domain under state law or in state courts which it could then do is clearly untenable. As was said in the Oakland case, "The Federal Power Act came to fulfill, not destroy." It is a remedial statute enacted by the Federal Congress to extend the rights of eminent domain in favor of licensees under the Act." The New York Court added "* * * the State does not surrender such power of eminent domain by acceptance of a license".

Since we hold that this Commission does have jurisdiction to hear the matter, the next question is whether the Petitioner has complied with requirements set forth under Vermont statutes. The Petitioner is clearly a public utility under the jurisdiction of the Commission and we so find.

"Under 30 V.S.A. Sec. 100, the right of eminent domain is granted to companies under the jurisdiction of the Commission when necessary [to] render adequate service to the public in the conduct of its business". Sec. 110 sets forth the procedure in instituting the eminent domain procedure which was followed in this case. Sec. 111 requires certain findings by the Commission. Sub paragraph (1) provides "In the case of dams, that a certificate of public good authorizing the project as herein required, or a license from the Federal Power Commission, has been granted".

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The Petitioners have raised the issue that their petition [illegible] condemnation of land for a dam and that as a [illegible] under 10 U.S.A. Sec. 111 etc. the Petitioner must [illegible] either a certificate of public good or a Federal [illegible]. The Petitioners state that no condemnation land [illegible] a dam but like for flowing land for a pole line. It [illegible] claims in any event, it has such a certificate, [illegible] determining whether it [illegible] have a certificate of [illegible] good, clearly it has no federal license it is necessary [illegible], to determine whether condemnation of land lying [illegible] a power plant and a dam all owned by the Petitioners is to be construed as land involving a dam. See. [illegible] can refers to a certificate authorizing the project. [illegible] certificate thereon referred to is the certificate [illegible] under 10 U.S.A. Sections 701 and 702. Sec. 701 [illegible] particularly relevant since the jurisdiction of the [illegible] Service Commission to investigate "dams and projects [illegible] to or are incident to the generation of electric [illegible] for public use". Certainly these projects and [illegible] sought here to be condemned are projects related to [illegible] incident to the generation of electric energy for public [illegible]. If any further authority is needed, the Wisconsin [illegible] under a statute authorizing the Public Service Commission to grant permits to construct, operate and maintain [illegible] to persons corporations or municipalities, held [illegible] the term "dams" is not limited to the structure [illegible] across the river bed but includes a canal which [illegible] water through a generating plant and back for the [illegible] *Kaukauna Public Service Commission*, 90 NW [illegible] 100, 101, 97 Wis. 507. In that case, the Public [illegible] Commission was authorized to grant a permit for [illegible] canal under the general statutory authority [illegible] permits "to construct, operate, and maintain [illegible]". Accordingly, we do hereby hold that under Sec. [illegible] it is necessary that the dam and plant associated

with this land to authorized to the extent required under Vermont law.

The Petitioner also claims that the Petitioner does not possess a certificate of public good authorizing the project. In determining whether there is a certificate, 10 V.S.A. Sec. 702 which provides that a permit is required was not passed until 1929. Thus, most of the original project here involved was constructed before there was any such statutory requirement. It was not until 1945, that a company in case of dams was required to show a certificate before proceeding in eminent domain cases under Sec. 111 (a), see 1945, No. 138 Sec. 6. In Docket #2080, dated September 27, 1954, the Petitioner did secure authorization under said section to make certain modifications on the dam and said modifications were permitted. Accordingly, so far as the record stands, no authorization was needed for the original dam since it was in existence before the time a permit was required. There have been no alterations appearing in the record which would require additional authorization other than those already granted. Therefore, we find that the Petitioner does possess all authorization required under Sec. 111.

30 V.S.A. Sec. 111 (b) also requires a finding of necessity in order to render adequate service. In this case, because of the topography, there is no question but what the Petitioner's land is necessary as a location for the penstocks for the Petitioner. The Petitioner attempted to negotiate in good faith for the purchase of said tract but the negotiations were unsuccessful. There is no possible alternative route, and the penstocks are absolutely necessary for the efficient operation of the power plants in

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order to maintain adequate reliable service to the public in the conduct of their business, and we so find.

The next question to be determined is the time of valuation. It is often said that the value is to be determined at the time of taking if there is no statutory law covering the proper time. In Vermont, the legislature has never seen fit to resolve the issue nor has there been a judicial ruling on this matter. In other states, there has been a variety of decisions and laws, see 3 Nichols, Eminent Domain, Sec. 85, page 17.

In this case, the lease expired on October 1, 1955 and according to the terms thereof, if the property were to be condemned, a petition was to be brought within 6 months. On March 27, 1956, the Petitioner filed its petition for condemnation of these lands. As is previously noted, an ancillary legal proceeding was then instituted by the Petitioners. Finally, on December 2, 1959, a hearingswas held to determine the value thereof. During the interval from October 1, 1955 to date, the petitioner has been paying a sum by way of rent to the Petitioners.

In trying to determine which is the best rule to adopt, consideration should be given to the intention of the parties if there is any. It would seem that, in this case, the parties were anxious to have condemnation instituted shortly after the expiration of the lease so as to avoid uncertainty to each. Several States have adopted the time of filing of the petition as being the proper time of valuation, such filing being the first actual step towards devoting the property to public use. This seems the just procedure for it does not encourage speculation by one of the parties to delay on the expediting of the case in hopes the value will change. Though the delay occasioned

as a result of other proceedings were not done with this in mind, it is an excellent example why the time of valuation should be made as of the date of the filing of the petition. Actually, there has not been any significant change in valuation between April 1, 1956 and December, 1959, but there may well have been. Accordingly, as a matter of law, the Commission rules that the time of valuation shall be March 27, 1956 and considers as appropriate and relevant any testimony of value submitted as of the close of 1955, a convenient time and close enough to be pertinent.

The evidence on value has been widely disparate. Petitioner's experts opining that the value is $2,000,000, excluding in their computations any value to the premises for the purposes of Petitioner, or any other utility, except as a development of a completely new hydro-electric generating facility on Petitioners' property taken alone and by itself. Petitioners' chief witness did not testify as to the value of the power to Petitioner but stated his opinion of fair market value of the land taken at $215,000.00, based on the general value of water power in Northeastern Vermont, the lease, sale value to another utility and the absence of lower riparian owners.

Our statutes, 30 V.S.A. § 109 et seq., provide for condemnation of "rights to appropriate, direct and flow back water," 30 V.S.A. § 115, and state that the Commission "shall adjudge the petitioner entitled to condemn such property or right, shall assess the compensation to be paid therefor, and shall determine the time and manner of such payment." 30 V.S.A. § 111 (3), thus leaving open the tests to be used in determining just compensation or in the words of the Vermont Constitution (Art. 2nd, C.1)

"an equivalent in money" of the property taken. While 30 V.S.A. § 124 does provide that "Upon the payment or deposit of the amounts awarded by the commission, with interest, in accordance with its order, the petitioner shall be the owner of the property or right described in the findings," there is no statutory indication as to the time at which the property is to be deemed taken for purposes of determining compensation. The Vermont cases leave these questions open, though *Hooker* v. *Montpelier & W.R.R.R.*, 62 Vt. 47, 49 informs us that the best available use of the property taken must be considered and "mere prospective speculative values" must be disregarded. We, therefore, feel free to turn to general law for purposes of determining the measure of compensation and the date at which such compensation is to be ascertained.

It seems apparent that here there may be lacking anything other than a nominal "fair market value" to the premises if we define that troublesome phrase in one of its better senses as "the price which the property would have brought in a market which the owner himself, but not the taker, is a potential bidder," and consider the land taken as a separate parcel. See 1 Orgel on Valuation under Eminent Domain (1953) § 15, p. 78. The only sale of property in the vicinity at all comparable as to which evidence was introduced related to a piece of property selling in 1955 for $10,000, but, while that piece was sold for power development purposes, it is downstream from the power house and plainly not comparable to the land in question here; the element of fall and the element of necessity for utilizing the upstream dam were not involved in the sale of the other parcel. That sale does demonstrate, however, the fallacy in the Petitioner's experts'

appraisal of the value of the Prouty land as such at $2,000,000. Of course, it has been suggested that in this type of case in the open market the owner might have sold the property to a land speculator buying in expectation of resale or the taking by Petitioner and that this would enhance the "market value" of the premises, 1 Orgel, op.sit. supra, § 83, but this is here too remote a possibility to be taken into account, or at least its effect would be too difficult to measure to warrant its consideration. From the Petitioners' standpoint it may be fortunate that we are not necessarily limited to making a finding as to "fair market value." As has been stated in *Beale* v. *Boston*, 166 Mass. 53, 55, 43 N.E. 1029 (1896), " " " market value is not a universal test, and cases often arise where some other method of ascertaining value must be resorted to." Or, as a leading valuation theorist puts it, "Market value is simply the ordinary test, to be rejected in those exceptional cases where it would not constitute just compensation." 1 Orgel § 18, p. 86.

Nor do we receive much satisfaction from the theory pressed upon us by Petitioners, that the rental value of $7,500 fixed in the original 1930 lease is "entitled to great weight at the present time." We do not quarrel with the general proposition that taking account of realized and prospective rentals is justified where direct evidence of sale value is inadequate, and in any event evidence of rental value is probably admissible, though by no means conclusive. *Sinsabaugh* v. *United States*, 168 F. 2d 264 (C.A. 4, 1948); *Grand River Dam Authority* v. *Martin*, 192 Okl. 614, 138 P. 2d 82 (1942). Indeed we do not disagree with the famous Goat Island and Prospect Park case, relied on by Petitioners here, basing awards for the taking of

those unique properties on such evidence. *Matter of State Reservation at Niagara*, 16 Abb. N.C. (N.Y.) 159 (1884), aff'd, 16 Abb. N.C. (N.Y.) 395 (1885). But here the income received from the property, the rental itself, was derived out of a transaction which we cannot justifiably hold was at full arms' length in the ordinary commercial sense: Newport Electric Co., owning the property, sold it and on the same day leased it back from Abbie Prouty, agreeing not only to pay rent but also to purchase it back at the end of the lease at a price to be fixed by one of three designated methods. To be sure, we do not know the consideration paid for the property by Mrs. Prouty, nor the considerations prompting the parties to enter into such an arrangement. But the arrangement was a peculiar one, which might properly be considered as amounting to a "forced-purchase." See *Ligare v. Chicago, M. & N. R. R. Co.*, 116 Ill. 249, 263, 46 N. E. 803 (1897): "The limitation to such price as the property would bring under ordinary circumstances surrounding the sales of property was necessary to exclude a price based upon necessity of railroad company, or upon what it would pay rather than get off the property." Uniformly, the courts have held that the necessities of neither owner nor taker must be permitted to affect the value to be received or paid. *Chelan Elec. Co. v. Parra*, 148 Wash. 353, 358, 268 Pac. 1040 (1928); *U. S. v. Fisher*, 49 Kan. 17, 30 Pac. 111 (1892) ("not a value obtained from the necessities of another"); *cf. Nanthala Power & Light Co. v. Sloan*, 41 S.E. 2d 361 (1947).

This case presents the difficult problem engendered by the reason of the fact that on the one hand the higher or best use of the land is plainly as a part of a hydroelectric

power site; it is unique; it has a special adaptability as such, has been used as such successfully and can and still is being used for this special purpose. On the other hand, however, taken in and of itself, and considered as a separate entity apart from the dam site upstream and power generating station below, its value as such a site for hydroelectric power development on it alone, which Petitioner's witness Hooper testified was of no value, is obviously limited. Indeed, such a development would probably be impractical and as such this testimony is basically unrealistic.

To resolve this dilemma we are still faced with two major problems of law and our ultimate valuation must be determined in the light of them. Should we give weight to the special or higher adaptability or use of the land in question as a part of a hydroelectric power development where as here it is dependent upon combination with other parcels of land and should we do so where the value of the combined parcels is dependent on the securing or retention of federal and state franchises or licenses? Should value to the taker—obviously not a conclusive test (1 Orgel § 83, p. 355)—be given any weight at all? To help solve these problems we can turn to the decided cases, though one notable commentator has cautioned that they may be on these questions "both confusing and irreconcilable" and indeed may "form a hopeless web of confusion and obfuscation." Bonbright, The Valuation of Property (1937 ed.) pp. 423, 425.

We can start with what has been called the leading case, *Mississippi & Rum River Boom Co. v. Patterson*, 98 U. S. 403, 25 L. ed. 206 (1878) where the Supreme Court held that the value of land, consisting of three islands in the

Mississippi River, must be determined "not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted"; that the position of the three islands fitted them to form "in connection with the west bank of the river, a boom of immense dimensions" and that "Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands." 25 L. ed. at 208. The Court pointed out that the owner whose land was being taken might have been given a license by the state to construct a boom and that the charter of the taker enabling it to receive and take control of all logs and timber to be conveyed to any point on the Mississippi was not exclusive. Thus, the case clearly holds, though it contains no penetrating analysis of its holding, that the land should be valued in combination with other lands not owned, apparently, by the owner, viz., the west bank of the river; and that where the taker's charter is not exclusive (there is nothing to indicate that the Citizens' franchise and license to operate a power site is necessarily exclusive), the value of the property in the light of its special adaptability must be taken into account.

United States v. *Chandler-Dunbar Water Power Co.*, 229 U. S. 51, 57 L. ed. 1063 (1913), on the other hand, reversed a lower court ruling that Oshowano Island in the St. Mary's river had "a strategic value with reference to any general scheme of water development in the river, and because it must be included as a tail race site, if not otherwise, in any completely efficient plan of development by any owner, private or public." Here the court held that "It is not proper to attribute to it any part of

the value which might result from a consideration of its value as a necessary part of comprehensive system of river improvement which should include the river and the upland upon the shore adjacent. The ownership is not the same. * * * The 'strategic value' for which $15,000 has been allowed is altogether speculative * * *. But in a condemnation proceeding, the value of the property to the government for its particular use is not a criterion." 57 L. ed. at 1082. Thus, the case denied value in conbination with other lands because such other lands were under other ownership, and held broadly in effect that value to the taker is not to be considered.

McGovern v. *New York*, 229 U. S. 363, 57 L. ed. 1228 (1913), narrows the *Chandler-Dunbar* holding somewhat, though sustaining as not in violation of the due process clause a New York determination of value without taking into account the value of land for a reservoir site where the enhanced value was dependent on "hundreds of titles to different parcels." Said the Court: "If the parcels were not brought together by a taking under eminent domain, the chance of their being united by agreement or purchase in such a way as to be available well might be regarded as too remote and speculative to have any legitimate effect on valuation. * * * The plaintiff in error was entitled to be paid only for what was taken from him as the titles stood, and could not add to the value by the hypothetical possibility of a change unless that possibility was considerable enough to be a practical consideration and actually to influence prices. * * * In estimating that probability, the power of effecting the change by eminent domain must be left out." 57 L. ed. at 1232. Thus, where so many titles are involved that as a practical matter

combination can be effected only through eminent domain, a finding of no strategic value does not violate due process, though the Court was careful to say that there is "wide discretion allowed to the trial court" and further careful to say that the holding was only that the due process clause was not violated. Here, of course, ownership is presently in only two hands, and there is nothing to indicate that ownership would necessarily have to be acquired by eminent domain.

Olson v. *United States*, 292 U. S. 246, 78 L. ed. 1236 (1934), involving Lake of the Woods shore lands taken for flowage easements that, inter alia, were available for the generation of power, held that no special value was allowable because "There could be no rational basis for any demand that would affect value to the owner for reservoir purposes unless, as a legal and practical possibility, he or some other person or persons—other than the expropriating authority—could have acquired the right to flow the lands necessary for the lawful raising of the lake." 78 L. ed. 1247. Because the lands involved were in two countries, neither of which could authorize expropriation in the other, and taking into account "the number of parcels, private owners, Indian tribes and sovereign proprietors to be dealt with," there was "no foundation for opinion evidence to the effect that it was practicable for private parties to acquire the flowage easements in question." In so holding, the court pointed out that:

> "The fact that the most profitable use of a parcel can be made only in combination with other lands does not necessarily exclude that use from consideration if the possibility of combination is reasonably

sufficient to affect the market value. Nor does the fact that it may be or is being acquired by eminent domain negative consideration of availability for use in the public service. *New York* v. *Sage*, 239 U. S. 57, 61, 60 L. ed. 143, 146, 36 S. Ct. 25. It is common knowledge that public service corporations and others having that power frequently are actual or potential competitors not only for tracts held in single ownership but also for rights of way, locations, sites and other areas requiring the union of numerous parcels held by different owners. And, to the extent that probable demand by prospective purchasers or condemnors affects market value, it is to be taken into account. Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403, 25 L. ed. 206, ubi supra."

United States ex rel T.V.A. v. *Powelson*, 319 U. S. 266, 87 L. ed. 1390 (1943) (5-4), allows no recovery for "water power value" when the combination required consisted of "several hundred other tracts owned by strangers" and "It was practically conceded that the acquisition of all the property necessary for the four-dam development could not, in all reasonable probability, be accomplished without resort to the power of eminent dómain." 87 L. ed. 1397. Again, however, the Court pointed out that "the value may be determined in light of the special or higher use when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract." The test of special value is whether there is "a reasonable probability of the lands in question being combined with other tracts for that purpose in the reasonably near future." 87 L. ed. 1398. In the case at bar, that probability has been a reality for many years past.

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In *Grand River Dam Authority* v. *Grand Hydro*, 335 U. S. 359, 93 L. ed. 65 (1948) (5-4), the Court held that expert testimony which gave recognition to the land's availability "as a power site" was admissible despite the fact that the owner did not have a federal license which would have been necessary under the Federal Power Act if it were to utilize the land as a power site. In *Grand River*, there was no question as to combination, but the case stands clearly for the proposition that the absence of an appropriate license under the Federal Power Act does not impair otherwise existent special values.

Compressing the Supreme Court cases in a nutshell we arrive at the conclusions that availability for special use in combination with other lands not owned by the person or body whose land is taken may be considered if there are not so many others involved that it would be purely speculative in the absence of an exercise of eminent domain powers to suppose that the lands could be united, and that the fact that the owner himself lacks necessary eminent domain or franchise powers is immaterial. Here the element of speculation is not present: The Prouty lands have been used as a part of a hydro-electric development for 30 years in combination with lands owned solely by Citizens Utilities Co. Leaving aside competitors in the private power business who might wish to acquire such a site were Citizens not now in operation, there is always the possibility that municipalities, the United States or even the State of Vermont might wish to do so for their own purposes at a price satisfactory to both Citizens and the Proutys, with or without the exercise of eminent domain powers. Accordingly, we hold that the special adaptability of the Prouty lands as a part of a power site

must be considered in determining what is just compensation or, indeed, fair market value. In so holding, we note the conflict in and support from, other state and lower federal court cases. See generally, 31 Col. L. Rev. 1 (1931); 29 Harv. L. Rev. 427, 428; *Smith* v. *Commonwealth*, 210 Mass. 259; 96 N.E. 666, 667; *Ford Hydro Elec. Co.* v. *Neely*, 13 F. 2d 361, 362 (C.A. 7, 1926).

U. S. v. *243.22 Acres of Land*, 48 F. Supp. 177, 180 (E. D. N. Y. 1942).

It is in applying the conclusion of law we have reached to the instant facts that difficulty occurs. In so doing, however, we were aided by a view of the premises, and we understand that it is our duty to arrive at a determination of value in the light of all the evidence. *Latchis* v. *State Highway Board*, 120 Vt. 120, 133. We understand that we are not bound by opinions of experts or by what might be thought to be the apparent weight of the evidence, but may reach our own conclusions, aided by the view and all of the evidence. *Shoemaker* v. *United States*, 147 U. S. 282, 37 L. ed. 170, 187 (1893).

In summarizing the evidence as to valuation, the petitioners presented two expert witnesses. The first expert witness for the petitioner was Alcott L. Hooper, Chief Hydraulic Engineer for Stone & Webster Engineering Corporation. Mr. Hooper, in arriving at a valuation to be placed upon the land and rights of the party interests disregarded any value this site might have to the Citizens Utilities Company. He approached the valuation problem by trying to determine whether or not this site, in and of itself, might have a value to a person interested in developing this site as a hydro project. The results of his study

indicated, and it was his opinion, that the site here involved had no value as such.

The next expert witness in behalf of the petitioner was George Clendaniel of Woodstock, Vermont, a real estate appraiser and a member of the American Institute of Real Estate Appraisers. Mr. Clendaniel disregarded any value that the property and the rights thereon might have to Citizens Utilities Company. He did testify that it might have value, but he did not know how much. In general, Mr. Clendaniel compared this property to similar properties located throughout Vermont which he had studied or as to which he was familiar with the terms of the past sales. He paid particular attention to the so-called Dale property, a larger parcel located below the site herein involved. The Citizens Utilities Co. paid $8,800 for this property, which it used in constructing a dam and diversion canal for the so-called Unit #11. He did testify (see page 336), however, that he thought that the property was sold primarily for land and could not testify for certainty whether or not the value herein involved indicated any value to the Citizens Utilities Co. as a part of a power development program. Mr. Clendaniel also testified that he paid very little attention to the terms of a lease under which this property was being rented by the Citizens Utilities Co. over the last twenty odd years. He testified that the terms of this lease in his opinion were not normal and therefore, he disregarded this in determining the value of the property herein involved. In conclusion, Mr. Clendaniel testified that the value of the property in his opinion was $2,000. (See page 253).

On behalf of the petitioners, Howard M. Turner, former instructor in hydraulics at Harvard University and pres-

cently a retired professor of civil engineering and a registered professional engineer, practicing under his own name, testified that in his opinion a fair market value for the premises in question would be $215,000 (see page 389). This value was determined by the witness after considering a number of factors. Among the factors considered was the general value of power in northeastern Vermont; the existence of suppliers of wholesale power, such as the New England Power Company; the steam plant in Burlington; the rate for surplus power sold by the Central Vermont Public Service Corporation; the fact that the property owned by the Prouty's had been rented for a number of years at $7500 a year and that there had been a valuation of $150,000 placed on the property in the early portion of the lease here in question; and lastly to some extent, the value of surrounding hydro-electric plants. Over and above these factors, the witness primarily placed his opinion as to the value of these rights upon the results obtained from a formula derived in the following manner. He determined that the plant now operated by the Citizens Utilities Company would produce 3,000 kilowatts of prime peak capacity and 12,900,000 kilowatt hours of energy. He then proceeded to determine what the cost of an alternative source of power would be for a capacity of this amount and a comparable amount of energy. He thereupon allocated a value of $25 per kilowatt for the 3,000 prime capacity arriving at a figure of $75,000. To establish a value of an alternative source of energy, he used a figure of 7½ mills which was an average of 9.2 mills for diesel energy and 5.7 mills for purchased energy. 12,900,000 kilowatt hours at 7½ mills equals $96,800.00, which makes a total of $171,800.00 as the value of the

output of this plant. Operating expenses, together with depreciation and estimated taxes amount were estimated as $108,500 leaving a net yearly income from this plant of $65,000. This amount was then capitalized at a rate of 6 1/2% arriving at a total value of the plant and rights of $973,000. The witness thereupon deducted the value of the plant, which was derived on a basis of original cost less accrued depreciation of $437,000.00, arriving at a figure of $533,000.00 odd dollars for the total overall value for the rights. To arrive at the value of the Prouty rights, the witness then divided this figure by one-half, arriving at an approximate figure of $267,000 as the basis for the Prouty water rights. In dividing the total overall value of the rights by one-half, the witness based his decision to do so on the fact that the Prouty water rights constituted generally one-half of the total head. The witness admitted that the fair market value as thus determined was the sale value to another public utility operator, be it Citizens Utilities or another, since utility companies would be the only possible purchaser.

Upon cross examination it was brought out that the value established per kilowatt of demand was a matter of judgment and could well have been a figure less than $25 a kilowatt. The witness further agreed that 7½ mills was in his best judgment a fair price for energy, though this again could be questioned. Cross examination further brought out that in allocating one-half of the value of the rights to the Prouty interests, he was not taking into consideration the bundle of rights that accrued as a result of the inclusion of the Clyde Pond, but had arbitrarily made his division on basis of head alone.

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Additional Findings of Fact

The other witnesses on the behalf of the petitioners were the party themselves; namely, John A. Prouty and Elsinor Prouty Mallory, both of whom testified that in their opinion the fair market value of the property here involved was $300,000.

After giving due consideration to the evidence as set out in the record, including among other things, the evidence of Mr. Hooper, Mr. Clendaniel, Mr. Turner, the lease contract, the value set forth by Mr. Gibbs and by petitioners themselves, and further basing our opinion on our view of the premises, it is the determination of the Commission that the fair market value for the premises in question is $95,000.

ADDITIONAL FINDINGS OF FACT

(of the Public Service Commission dated October 17, 1960)

1. In addition to the Findings already set forth in Docket No. 2742, dated August 26, 1960, the Commission additionally finds that the property to be condemned is as follows:

The property and rights to be taken in this condemnation proceeding, valued as aforesaid, are more particularly described as being all and the same lands, premises, water power, dam, water privileges, buildings, machinery and fixtures as described in a certain indenture and

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Additional Findings of Fact

agreement between Abbie D. Prouty, a widow, and Newport Electric Light Company, dated July 29, 1930, wherein such property and rights is more fully described as follows:

"Being all and the same land and premises which were conveyed by Spaulding Brothers Corporation, a corporation, to Charles A. Prouty by warranty deed dated December 31, 1906, and recorded in Book 27, Pages 595 and 596 of the Land Records of the Town of Derby, Vermont, more particularly described as the 'Spaulding Pulp Mill Property' so-called; situated on Clyde River in the City of Newport, Orleans County and State of Vermont, a little above the plant of the Newport Electric Light Company, with all water power and water privileges thereunto belonging or appertaining. Being the same land and premises conveyed to said Spaulding Brothers Company, a corporation, organized and existing under the laws of the State of Vermont by three several deeds:—

(1) By a quit-claim deed from Edward F. Spaulding to said corporation dated August 26, 1901, and recorded in Book 25, Page 80, of the Land records of said Town of Derby.

(2) By a quit-claim deed from Waldo Spaulding to said corporation, dated August 26, 1901, recorded in Book 25, Page 81, of the Land Records of said Town of Derby.

(3) And by Huntley N. Spaulding, as administrator of the estate of Jonas Spaulding, by an administrator's deed dated August 26, 1901, and recorded in Book 20, Page 300 of the said Land Records, to which deeds and said records thereof, reference is hereby made for a more particular description.

Appendix C

Additional Findings of Fact

Meaning to include what is known as the Pulp Mill Property, water power, dam, water privileges, and all buildings, machinery and fixtures now on said property, and being the same real estate which was conveyed to the Newport Electric Light Company by Charles A. Prouty by an instrument dated June 29, 1907, and recorded in the Derby Land Records in Book 28, Pages 367 and 368; all of said property having been willed to Abbie D. Prouty by the late Charles A. Prouty, and having been decreed to said Abbie D. Prouty by the Probate Court for the District of Orleans, State of Vermont."

The interest of the said Charles T. Prouty in and to the property and rights so taken in condemnation is described in quit-claim deed of Boston Safe Deposit and Trust Company to Charles Tyler Prouty, dated July 17, 1936, and of record in Book 10, Page 354, of the Land Records of the City of Newport, Vermont.

The interest of The Third National Bank and Trust Company in and to the property and rights so taken in condemnation is described in warranty deed of Charles Tyler Prouty to said Bank, dated December 23, 1941, of record in Book 12, Page 590, of the Land Records of the City of Newport, Vermont.

The interests of Genevieve Prouty Gage in and to the property and rights so taken in condemnation are described in quit-claim deed of Boston Safe Deposit and Trust Company to Genevieve Prouty Gage dated March 25, 1947, and of record in Book 15, Page 434, of the Land Records of the City of Newport, Vermont, and in a mortgage deed of an undivided one-fourth interest thereof as described in mortgage deed from Howard A. Mallory and Elsinor Prouty Mallory to Genevieve P. Gage, dated

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February 27, 1953, and of record in Book 19, Page 255, of the Land Records of the City of Newport, Vermont.

The interest of John A. Prouty in and to the property and rights so taken in codemnation is described in quit-claim deed of Boston Safe Deposit and Trust Company to John A. Prouty, dated October 18, 1946, and of record in Book 15, Pages 364 and 365, of the Land Records of the City of Newport, Vermont.

The interest of Elsinor Prouty Mallory in and to the property and rights so taken in condemnation is described in a quit-claim deed of Boston Safe Deposit and Trust Company to her dated August 29, 1952, and of record in Book 19, Page 70, of the Land Records of the City of Newport, Vermont, subject to mortgage of record held by Genevieve Prouty Gage as appears in Book 19, Page 255, of said Land Records, above enumerated.

Reference may be had to said indenture, agreement, deeds and the records thereof for a more particular description of the property and rights here involved and taken in condemnation.

2. That the petitioner, Citizens' Utilities Company, exports small amounts of power to the Dominion of Canada.

3. That the reference to the *Citizens Utilities* vs. *F.P.C.* on Page 3 of the Report is hereby amended to read 279 Fed. (2nd), Page 1, rather than 276 Fed. and said case together with the Opinion and Order of the Federal Power Commission is hereby made a part of this record.

Appendix D

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THE THIRD NATIONAL BANK AND TRUST COMPANY,

Plaintiffs-Appellees,

v.

CITIZENS UTILITIES COMPANY,

Defendant-Appellant.

No. 206, Docket 24820.

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT.

Argued April 9, 1958.

Decided July 3, 1958.

Certiorari Denied Oct. 20, 1958.

See 79 S.Ct. 98.

GALLOP, CLIMENKO & GOULD, New York City, and CLIFTON G. PARKER, Morrisville, Vt., for appellant. MILTON S. GOULD, ARTHUR S. FRIEDMAN, New York City, of counsel.

HAROLD I. O'BRIEN, Rutland, Vt., and ARTHUR GRAVES, St. Johnsbury, Vt., for appellees. EDWIN W. LAWRENCE, Rutland, Vt., of counsel.

Before SWAN, HINCKS and MOORE, Circuit Judges.

SWAN, Circuit Judge.

This is an appeal by defendant from a judgment for plaintiffs in a suit for specific performance of a contract to buy land located in the City of Newport, Vermont. Federal jurisdiction was based on diversity of citizenship

between the respective parties. The defendant, a public utility corporation supplying electric power locally and in interstate and foreign commerce was in possession of the property under a 25 year lease made in 1930 between the plaintiffs' predecessor in title, as lessor, and the defendant's predecessor, as lessee. The lease provided that it should enure to the benefit of, and be binding upon, the heirs, successors and assigns of the respective parties. By the terms of the lease the defendant was obligated to buy, and the plaintiffs to sell, the leased property within six months after the termination of the lease on October 1, 1955, at a price to be agreed upon, or failing agreement, at a price to be determined by condemnation proceedings to be instituted by the defendant within said six months period "before the tribunal then having jurisdiction of such proceedings." If such proceedings were not instituted, the price to be paid for the property was $300,000. No agreement as to price having been reached, the defendant, on March 27, 1956, filed a timely petition for condemnation with the Vermont Public Service Commission pursuant to sections 9331-9333 of Vermont Statutes, Revision of 1947. The plaintiffs were named as defendants to this petition which is still pending, and no action upon it has been taken by the Vermont Commission.

On May 11, 1956, the plaintiffs brought the present suit for specific performance of their contract with the defendant. The property involved is located astride the Clyde River, which is a principal tributary of Lake Memphramagog. The only issue of fact in dispute was whether the Clyde River was a navigable stream. An advisory jury returned a verdict that the river was a navigable stream within the meaning of the Federal Power Act, Chapter 12 of Title 16 U.S.C.A. Judge Gibson approved the jury's verdict. He found also, as admitted by the pleadings in

the federal suit, that the defendant had not applied for or obtained from the Federal Power Commission a license for constructing, operating and maintaining its facilities along, over, or in the Clyde River, and had not filed with the Federal Power Commission a declaration of its intention to construct such facilities, pursuant to § 23 of the Federal Power Act, 16 U.S.C.A. § 817. Because of these findings the trial judge held that the Vermont Public Service Commission was without jurisdiction to hear and determine the petition for condemnation pending before it, and consequently the defendant had defaulted under its contract and was obligated to purchase the property at the price of $300,000. The decree appealed from so directed.[1] Judge Gibson's opinion is reported in 150 F. Supp. 892.

[1, 2] The opinion of the district court and the briefs of the parties in this court have taken a much wider range than we think necessary for disposition of the appeal. In our view the decision can rest on a principle of narrow compass. Necessary to the harmonious cooperation of federal and state tribunals is the well recognized rule that the court first assuming jurisdiction over property may maintain and exercise its jurisdiction to the exclusion of the other.[2] The petition for condemnation was a suit *in rem*, where the state tribunal must control the property to give effect to its jurisdiction.[3] Obviously, the federal

1. The complaint also prayed for an injunction to restrain the defendant from prosecuting its condemnation proceeding. Since the decree for specific performance was dispositive of the case, the requested injunction was denied.

2. United States v. Bank of New York & Trust Co., 296 U.S. 463, 477, 56 S.Ct. 343, 80 L.Ed. 331; Princess Lida, etc. v. Thompson, 305 U.S. 456, 466, 59 S.Ct. 275, 83 L.Ed. 285; Mandeville v. Canterbury, 318 U.S. 47, 48, 63 S.Ct. 472, 87 L.Ed. 605.

3. United States v. 625.91 Acres of Land, etc., D.C.Mo., 49 F.Supp. 997, 1000.

court could not decree specific performance of defendant's contract to buy the land without violating the above mentioned principle of cooperation between state and federal tribunals. Although the district court did not grant the requested injunction against prosecution of the condemnation petition, its decree was as effective an interference with that proceeding as an injunction would have been. The granting of such an injunction is prohibited by 28 U.S.C.A. § 2283. See National Quarries Co. v. Detroit T. & I. R. Co., 6 Cir., 10 F.2d 139, 140. There a bill in the federal court to enjoin the defendant's prosecution of a state suit to condemn land was dismissed.

Any objection which the plaintiffs wished to make to jurisdiction of the state tribunal could have been as effectively urged before it as in the federal court, and its decision could have been reviewed as provided in the Vermont statutes, and ultimately, if a federal question were involved, by the Supreme Court of the United States. We think the court below erred in holding that the Public Service Commission lacked jurisdiction. That was an issue for that tribunal to decide for itself subject to review as above stated.

[3] Accordingly the decision on appeal is reversed; but we do not direct that the federal suit be dismissed because, if the question of jurisdiction should ultimately be decided in the appellees' favor, the tendency of the federal suit will prevent the running of any statute of limitations.

Appendix E

Order Denying Application for Rehearing

[1787]

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, and William R. Connole.

In the Matter of Citizens Utilities Company	Docket Nos. E-6716 and E-6760

ORDER DENYING APPLICATION FOR REHEARING

(Issued April 3, 1959)

On March 18, 1959, Citizens Utilities Company applied for rehearing of the Commission's Opinion No. 318 and order issued February 16, 1959, requiring Citizens to apply for a license under the Federal Power Act for the continued operation and maintenance of its Unit No. 11, Newport and Charleston hydroelectric developments on the Clyde River in Vermont and the Seymour Lake and Echo Pond dams on a tributary thereof.

With respect to the numerous objections made to our findings we find none which necessitates amending or modifying our findings. Citizens has also requested that the time within which it is directed to file application for license in accordance with our order issued February 16, 1959, be deferred until such time as all proceedings to review said

Appendix E

Order Denying Application for Rehearing

orders have been completed. We think it appropriate to grant this request pending review. However, an important basis for our previous action in requiring application for a license was the damage done and threatened to the fishery resources of the Clyde River by the operation of Citizens' facilities. In order to protect the fishery resources during any review proceedings, or in any case until the conditions of a license attach, we shall require that Citizens shall effect a minimum release of water during the spawning periods.

The Commission further finds:

(1) The assignments of error and grounds for rehearing set forth in the application for rehearing filed by Citizens set forth no new facts or principles of law which were not fully considered by the Commission when it adopted its Opinion No. 318 and accompanying order issued February 16, 1959, or which having now been considered warrant any change or modification in said opinion and order except as provided below.

(2) It is appropriate in the administration of the Federal Power Act that time for compliance with our order issued February 16, 1959, be extended and that Citizens be required to effect a minimum release of water as provided below.

[1788]

The Commission orders:

(A) The application for rehearing filed by Citizens is hereby denied except as provided below.

(B) The requirement that Citizens shall file an application for license as provided in paragraph (A) of our previous

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order is hereby postponed until 60 days after the time for review has expired, or, if Citizens files a petition for review, until 60 days after the issuance of a final mandate by the reviewing court.

(C). Until further order of the Commission Citizens shall release a minimum flow of 35 cubic feet of water per second through the sluice gate of its Unit No. 11 diversion dam in the Clyde River from the date of issuance of this order through June 30, 1959, and thereafter each year from April 1 through June 30 and during such additional period or periods as fish are spawning or migrating in the river below the Unit No. 11 diversion dam.

By the Commission.

JOSEPH H. GUTRIDE
Joseph H. Gutride,
Secretary.

Appendix F

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 259—October Term, 1959.

(Argued April 8, 1960 Decided May 24, 1960.)

Docket No. 25705

CITIZENS UTILITIES COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

Before—LUMBARD, Chief Judge,

HAND and HINCKS, Circuit Judges.

On petition to review an order of the Federal Power Commission, determining that the Clyde River in Vermont is "navigable water of the United States" within the meaning of the Federal Power Act, and that, even though the entire river may not be navigable, the operation of the petitioner's hydroelectric dams across the river "affects interests of interstate or foreign commerce."

MILTON S. GOULD, GALLOP, CLIMENKO & GOULD, New York City, REUBEN GOLDBERG, Washington, D. C., CLIFTON G. PARKER, Morrisville, Vt., for petitioner.

JOHN C. MASON, Deputy Gen. Counsel, Federal Power Commission, Washington, D. C., for respondent (WILLIARD W. GATCHELL, Gen. Counsel, HOWARD E. WAHRENBROCK, Solicitor, LEONARD D. EESLEY, Assistant General Counsel, DANIEL GOLDSTEIN and JOSEPH B. HOBBS, Attys., Federal Power Commission, Washington, D. C., on the brief).

HAND, Circuit Judge:

In this case the petitioner, a Delaware corporation, has built hydroelectric dams at several places on the Clyde River, Vermont, which rises in the northeast corner of the state and empties into Lake Memphremagog at Newport, Vermont. Lake Memphremagog itself extends from Newport across the border of Canada and into Canada.

After leaving a small pond, called Spectacle Pond, the Clyde passes through Island Pond, another small sheet of water, whence it meanders for six or seven miles until it is joined by a brook that carries the overflow of two other ponds, Seymour Lake and Echo Pond, at East Charleston. The Clyde continues for about five miles further, passing through Pensioner Pond and thence through Salem Pond until after three miles or so it passes through Clyde Pond and after about two miles more reaches Lake Memphremagog. The petitioner had already built dams at the outlets of Seymour Lake and Echo Pond and also across the river at West Charleston and at Clyde Pond. Another dam above the West Charleston dam had been built at Barton Village which the petitioner does not control. The occasion of this suit is the petitioner's construction of a new project including a "diversion dam," a canal, and a

power plant, called Unit No. 11, across the river below the dam at the outlet of Clyde Pond.

In June 1937, the Commission began to investigate this partially completed power project in order to determine whether it was in the public interest to control it in order to preserve the navigation and water supply of the Clyde. In preliminary negotiations the parties stipulated that the petitioner should be free to oppose the jurisdiction of the Commission in spite of a "declaration of intention" made by the petitioner. The Commission held extensive hearings before a presiding examiner who wrote a decision declaring that the Clyde was not "navigable water of the United States" except for the first 4800 feet from its mouth, but that the petitioner's proposed Unit No. 11 and its Newport project affected the interests of interstate or foreign commerce in that part of the stream, and that the Commission therefore had jurisdiction under § 817 of Title 16, United States Code, to grant or refuse a license to maintain both projects. The Commission reversed the examiner and found the whole river navigable, apparently from Spectacle Pond to its mouth, and also that not only Unit No. 11 and the Newport project affected the navigability of the river, but that the petitioner's other projects did so. The petition is to review all parts of the Commission's order.

There can be no doubt that the Clyde Pond dam and Unit No. 11 both have an effect upon the navigability of the river in its last 4800 feet. Indeed, the petitioner does not dispute that the volume of water that reaches the river below the Unit No. 11 changes when the "diversion dam" and the Clyde Pond dam are opened, as they are when hydroelectric generators at Unit 11 and at the New-

port project are operated. It was proved that when the dams were opened, the height of the water below the Unit 11 rose eighteen inches and did not assume the level of the Lake until it reached Gardner Park Bridge at a distance of more than half a mile away. There was also evidence that the shutdown of Unit No. 11 made a sixteen foot boat with four passengers and 1800 pounds of freight repeatedly scrape bottom, although when the dam was opened the boat moved without touching. Again, when the power was shut off and the dams were filling, rocks showed above the water in the stream that were covered when the power was put on again. There was a regular correlation between the two, showing changes in total water volume at times of between 12 and 282 cubic feet per second.

The petitioner's dams at West Charleston being about ten miles above the Clyde Pond dam, and those at Seymour Lake and Echo Pond being about twenty miles away, it is, of course, true that the effect of the "diversion dam" at Unit No. 11 and of the Clyde Pond dam upon the navigable part of the river is much more immediate than that of the dams upstream, but the water impounded by the upper dams can in the end escape only through that last mile, and the dams give the petitioner control over the time when it shall arrive. We omit the Barton Village project that does not belong to the petitioner; but Seymour Lake and Echo Pond together impound 4500 "acre feet" of water as against only 1000 "acre feet" impounded by the Clyde Pond dam. It cannot be said that the "effect" of the petitioner's control of so much water tributary to the navigable part of the river is so inconsiderable as to be beyond the scope of § 817: that is to say, that "interest of interstate or foreign commerce would" (not) "be affected by the con-

struction of a dam" of the kind here at issue. The only question before us is as to the jurisdiction of the Commission, not how far the public interest requires the Commission to regulate their maintenance and use. It must always be remembered that in construing subchapter I of chapter XII of Title 16, United States Code, we are to take into consideration, not alone the condition of a stream as it is, but that "it is proper to consider the feasibility of interstate use after reasonable improvements which might be made." *United States* v. *Appalachian Power Company*, 311 U. S. 377, 409. Since there can be no doubt that the last mile of the river is "navigable" without change, the only question is whether the amount of water by which the petitioner can vary its flow affects that part of the river enough to give the Commission jurisdiction over the granting of a license.

It is not necessary for us to measure how much such variation will justify actual intervention by the Commission. The "finding of the Commission as to the facts, if supported by substantial evidence shall be conclusive" (§ 825 l(b)), and it is apparent that the evidence was enough to prove that the petitioner's dams, without change and at the will of the petitioner, are capable of "affecting" temporarily the flow of water in the river below Unit 11, and, indeed, that they do so in the ordinary operation of the petitioner's business. The situation appears to us to be essentially the same as in *Georgia Power Company* v. *Federal Power Commission*, 152 Fed. (2) 908, 913 (C. A. 5).

Concluding as we do that all the petitioner's dams on the Clyde River do "affect" the navigability of the last mile of that river, it becomes unnecessary for us to decide how much if any of the river above Unit No. 11 is "navigable." That question therefore we leave open.

The order of the Commission requiring an application for license is affirmed on the limited ground stated above.

Office Supreme Court, U.S.
FILED
MAR 19 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 731

CITIZENS UTILITIES COMPANY (NEWPORT ELECTRIC DIVISION),

Petitioner,

vs.

CHARLES S. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

BRIEF OF RESPONDENTS

Charles S. Prouty, Genevieve Prouty Gage, John A. Prouty, Elsinor Prouty Mallory and Third National Bank & Trust Company file this brief in opposition to the Petition of Citizens Utilities Company for Writ of Certiorari to the Supreme Court of the State of Vermont.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 731

CITIZENS UTILITIES COMPANY
(NEWPORT ELECTRIC DIVISION),

Petitioner,

vs.

CHARLES S. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF VERMONT

BRIEF OF RESPONDENTS

Charles S. Prouty, Genevieve Prouty Gage, John A. Prouty, Elsinor Prouty Mallory and Third National Bank & Trust Company file this brief in opposition to the Petition of Citizens Utilities Company for Writ of Certiorari to the Supreme Court of the State of Vermont.

Jurisdiction

The jurisdiction of the United States Supreme Court does not include review of state court decisions involving questions of local law outside the scope of Title 28 U.S.C. § 1257(3).

Thus, where the validity of a treaty or statute of the United States is *not* drawn in question, and where the validity of a state statute is *not* drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and where *no* title, right, privilege or immunity is especially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States, the decision of the state court is not subject to review by *certiorari* here under the provisions of title 28 U.S.C. § 1257(3).

In the instant case, the validity of federal law was recognized and upheld. Moreover, petitioner claimed and had acquired no rights under any federal law.

Statutes Involved

In addition to the statutes set forth in the Petition, 16 U.S.C. §814 reads as follows:

"§ 814. *Exercise by licensee of power of eminent domain*

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necessary to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000. June 10, 1920, c. 285, §21, 41 Stat. 1074."

30 Vermont Statutes Annotated §115 provides:

"§115.—*Scope of application*

"Without limiting or enlarging the scope of sections 109-114 of this title, it is hereby specifically provided that they shall apply to the condemnation of rights to

construct and maintain pipe lines, conduits, lines of poles, towers or wires, and to rights to appropriate, divert and flow back water." Vol. 8, page 125.

Questions Presented.

The Vermont Supreme Court decided that the state Public Service Commission had no jurisdiction.

The real questions presented are:

1). Is or is not the decision of the highest state court as to the jurisdiction of the Vermont Public Service Commission state law and as such to be treated as an act of the Vermont legislature?

2). Does the holding that the Vermont Public Service Commission had no jurisdiction to grant condemnation involving dams, conduits and the privilege of diverting and flowing back water of a navigable stream or other water of the United States to a would-be-condemnor, lacking a license from the Federal Power Commission, conflict with the constitution or any treaty or law, of the United States or any title, right, privilege or immunity thereunder?

No application for reargument or rehearing before the Vermont Supreme Court and no application for a stay of final judgment was ever filed by the Petitioner either with the Vermont Supreme Court or the Public Service Board. (Respondents' Appendix G, page 1a, and Respondents' Appendix H, page 2a). Neither has there been any application for a stay pursuant to Rule #27 of this Court.

Statement

The Vermont Supreme Court did not accept the conclusion of the Public Service Board that petitioner possessed all authorizations required under the Vermont Statutes, as petitioner erroneously asserts in its brief pages 6 and 13. Instead the Opinion states:

"The certificate of public good mentioned in 30 V.S.A. §111(1) is issued by the Public Service Commission after a hearing on a proposed project and a determination by the Commission that the proposed project is for the benefit of the people of the State of

Vermont: 10 V.S.A. §706. The petitioner has no certificate of public good in the instant case * * *" (Appendix pp. 6a, 7a)

Later in its opinion the Vermont Supreme Court said:

"A private corporation has no right to eminent domain in the absence of a delegation of such power to it from the sovereign by virtue of constitutional or statutory provisions. 29 C.J.S. Eminent Domain §24 p. 813. See *George* v. *Consolidated Lighting Co.*, 87 Vt. 111. The statutory provisions of 30 V.S.A. §111(1) grants the right of eminent domain to a private corporation before the Public Service Commission provided that such corporation has a certificate of public good from the State, or a license from the Federal Power Commission. The certificate of public good is the vehicle by which the State of Vermont delegates the ri[illegible] eminent domain to a private corporation, just as [illegible] license from the Federal Power Commission serves as the delegation of such power on the part of the United States." (Appendix B, pages 10a, 11a).

Nowhere in the record is there anything to suggest that petitioner had complied with the valid requirement of the state statute, 30 Vermont Statutes Annotated §111, that it have a state certificate of public good authorizing the project or a license from the Federal Power Commission. It had neither. (Appendix B, pages 7a, 11a; Appendix C, page 24a).

There are some errors and unwarranted misstatements in the Appendix and statement of the case which should be corrected at this point.

The citation to 29 C.J.S. Eminent Domain of the Appendix page 11a should read "Section 24 page 813" and not "page 12" as there appears.

The statements in the Petition, page 6, in the second paragraph, with respect to the antiquity of the penstocks and the use of the water from Clyde Pond dam, are quite erroneous and utterly misleading, creating the impression, as they evidently are intended to do; that the development in question was in use prior to the passage of the Federal Power Act which was enacted June 10, 1920.

According to the findings of the Vermont Public Service

Board, the Clyde Pond dam was not constructed until 1921 or 1922. The original penstock was not extended upstream to the Clyde Pond dam until 1940. (Appendix C page 20a).

The other penstock six feet in diameter was built in 1931 (Appendix C page 20a) *after* the lease in question and *not before*, as the Petition erroneously states. Therefore, the statements as to the time of construction in this paragraph on page 6 of the Petition are both false and misleading.

Summary of Argument

The sovereign power of eminent domain is legislative in character. It may be delegated as here to a tribunal created by the Vermont legislature, namely, the Public Service Board. The extent of the jurisdiction and power thus delegated is subject to the legislative fiat. Hence, any question as to the jurisdiction of the Public Service Commission in eminent domain proceedings is fundamentally one of state law.

The Vermont legislature has recognized the authority of the United States pursuant to the Federal Power Act, by making a license from the Federal Power Commission in the case of interstate waters, and a certificate of public good from the state commission in the case of intrastate waters, a prerequisite to the exercise of the power of eminent domain. Petitioner has no standing to question by certiorari the interpretation and application of this statute made by the Vermont Supreme Court because it had no federal license and resisted in every way possible the authority of the Federal Power Commission and the order that it obtain such a license.

The following extracts from the opinion of the Vermont Supreme Court show adequate grounds for the dismissal of the petition for condemnation.

App. B 6a "We therefore agree with the Public Service Commission that the dam and powerhouse with which this land is associated, must be authorized under Section 111(1) of 30 VSA."

App. B 7a : The petitioner has no certificate of public good in the instant case."

App. B 5a "The report also states that the petitioner does not have the license under the Federal Power Act which it was ordered to obtain from the Federal authorities."

Those are admitted facts.

ARGUMENT

I.

The jurisdiction of the Vermont Public Service Commission in eminent domain proceedings is a question of state law.

While this proposition seems self-evident, we may properly inquire why it is so.

The power of eminent domain is an attribute of sovereignty inherent therein as a necessary and inseparable part thereof. It lies dormant until legislative action is had pointing out the occasions, the modes and the agencies for its exercise.

George v. *Consolidated Lighting Co.*, 87 Vt. 411, 89 A. 635;

In re Ely Ave., 217 N. Y. 45, 111 N. E. 266.

U. S. v. *458.95 Acres of Land*, 22 Fed. Supp. 1017.

"The question under what conditions the power of eminent domain may be exercised is purely legislative; but it is for the courts to decide whether the statutory conditions authorizing the exercise of the power exist in the particular case."

Gillette v. *Aurora R. Co.*, 228 Ill. 261, 81 N. E. 1005.

Of course, in the case of waters over which Congress has control by virtue of the commerce clause of the Constitution, the *power* to exercise the right of eminent domain is derived from the United States pursuant to the Federal Power Act. It is not gratuitously bestowed on non licensees. Moreover, the procedure in state tribunals is in accordance with local law.

As the opinion of the Vermont Supreme Court well says (Appendix B, page 11a) "A private corporation has no right to eminent domain in the absence of a delegation of such power to it from the sovereign by virtue of constitutional or statutory provisions."

Tyler v. *Beecher*, 44 Vt. 648, 8 Am. Rep. 398;
General Petroleum Corporation of California v. *Hobson*, 23 F. 2nd 349.

The Federal Practice and Procedure in condemnation proceedings must be according to forms and proceedings in state where proceedings are had, by licensees under the Federal Power Act, 16 USC §814, as in other cases, 33 U.S.C. §591, Fed. Rules Civ. Proc. rule 71A, (k) 28 U.S.C.A.

United States v. *Federal Land Bank*, 127 F. 2nd 505.

II.

None of the issues draw in question either the Constitution or any treaty or law of the United States or any title, right, privilege or immunity thereunder.

The petitioner did not traverse or deny the plea filed by these respondents as to the jurisdiction of the Vermont Public Service Commission (Respondents' Appendix I page 4a). This plea alleged that the Clyde River was a navigable stream and waters of the United States and that Citizens Utilities Company was seeking to condemn real estate, water power, dam, and water privileges on that River and had never applied for or obtained a license pursuant to the Federal Power Act or a permit or valid existing right of way granted prior to June 10, 1920. The Public Service Commission treated this plea as insufficient and summarily denied it.

In view of this record, respondents say:

(1) That the petitioner, Citizens Utilities Company, has not drawn in question the validity of any statute of the United States; (2) Petitioner has not drawn in question the validity of any state statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States; (3) Petitioner makes no claim to any title, right, privilege or immunity under the Constitution, treaties or statutes of the United States as required by 28 USC §1257. Instead, petitioner has at all times questioned the validity of the orders of the Federal Power Commission and has opposed though unsuccessfully, the assertion of any jurisdiction over the river by the Federal Power Commission. Thus, petitioner has failed to point out whereby it has any rights under the Federal Power Act or any other law of the United

States which have been violated or impaired by the decision of the Vermont Supreme Court. In as much as the petitioner, Citizens Utilities Company, lacks any license from the Federal Power Commission and has consistently opposed all action of that Commission requiring it to apply for a license, it certainly did not have any rights under the Federal Power Act as a non-licensee. (Appendix E page 49a; Appendix F page 52a; Respondents' Appendix J page 10a; Respondents' Appendix K page 11a; Respondents' Appendix L page 13a).

The decision of the Vermont Supreme Court does not go beyond its jurisdiction. It does not in any manner whatsoever trespass upon the jurisdiction of the Federal Power Commission. Hence, it presents no substantial federal question. There is no challenge to any federal jurisdiction or right.

Radio Station WOW, Inc. v. *Johnson*, 326 U.S. 120, 127, 89 L. Ed. 2092;

S. R. A. Inc. v. *State of Minnesota*, 327 U. S. 558, 565-566, 90 L. Ed. 851;

Lake Erie, etc., R. Co. v. *State Public Utilities Commission*, 249 U. S. 422, 424, 63 L. Ed. 684.

III.

Although the artificial questions framed in the petition for certiorari, page 3, are all questions of local law, the Vermont Supreme Court correctly answered these questions in the affirmative and in accordance with applicable law, because the Clyde River is navigable, for

1) The Vermont Statute, 30 VSA §111(1), according to the holding of the Supreme Court, requires a license from the Federal Power Commission upon a navigable stream over which the Federal Power Commission has jurisdiction before eminent domain proceedings may be maintained. (Appendix B, page 12a).

While the Vermont statute specifies either a state "certificate of public good authorizing the project" or "a license from the federal power commission," they are not in any given case the equivalent of each other, in the sense that (1) a state certificate equals a federal license in the case

of *interstate* waters over which Congress and the Federal Power Commission have jurisdiction, and (2) a federal license may be substituted for a state certificate as respects purely *intra*state streams.

Bellows Falls Hydro Electric Corp., 114 Vt. 443 at 445, 448, 47 A. 2nd 409, 49 A. 2nd 561;

Minnesota Canal & Power Company v. *Pratt*, 101 Minne. 197, 234, 112 N. W. 395.

The latter was a condemnation case. The opinion of the Minnesota Supreme Court is squarely in point here, for it held that under Section 9 of the Rivers and Harbors Act, now 33 U. S. Code Section 401, a public service corporation has no right to exercise the power of eminent domain in furtherance of an enterprise affecting navigable waters without first having obtained the approval of the Federal Government.

The Minnesota Court there said:

"The courts of this state are asked in this proceeding to say that the enterprise is proper, and to authorize the petitioner to proceed without complying with the acts of congress. Before the prayer of the petition can legally be granted, the court must say that the enterprise is authorized by law. This it cannot do until the petitioner shows that it has complied with the conditions of the act of congress."

2) The Vermont Supreme Court was required by both state and federal law to dismiss the condemnation proceeding because the petitioner lacked the requisite federal license.

Niagara Falls Power Company v. *Federal Power Commission*, 137 Fed. 2d 787, 791, certiorari denied, 320 U. S. 815.

There, the Power Company relied upon the fact that at the time it applied for a federal license, it already had a permit issued by the State of New York. L. Hand, Judge, rejected this contention and held that no prescription could run against the United States and that the State's permit being beyond its power did not give the Company any right to seize upon the energy of the nation's streams, or to impair their navigability.

Judge Hand remarked—"It would have been a groundless compunction which should have protected 'permits,' 'rights of way,' or 'authority' granted by municipalities or states." • • • "What equitable claim then has a company which relies upon the grant by a state of something beyond its power? What standing does a state's license give it to seize upon the energy of the nation's streams or to impair their navigability?"

There is ample judicial authority in addition to the statute, 16 USC §814, demonstrating the necessity for a license.

> "Authorization of this project, therefore, is within the exclusive jurisdiction of the Federal Power Commission, unless that jurisdiction is modified by other federal legislation."
>
> *Federal Power Commission* v. *State of Oregon*, 349 U. S. 435, 445, 99 L. ed. 1215.
>
> "'The licensee by virtue of section 814 becomes vested with the governmental power of eminent domain'."
>
> *Tuscarora Nation* v. *Power Authority of State of New York*, 257 F. 2nd, 885, 894, cert. den. 358 U. S. 841, 3 L. Ed. 2nd 76, 79 S. Ct. 66, rehearing denied 360 U. S. 923, 3 L. ed. 2nd 1538, 79 S. Ct. 1431.
>
> ". . . a license is a pre-requisite in that water rights under state law in a navigable stream may not be exercised without one. . . ."
>
> *Niagara Mohawk Power Corp.* v. *Federal Power Commission*, 202 F. 2nd, 190 at 207, affirmed 347 U. S. 239, 98 L. ed. 666, 74 S. Ct. 487.
>
> "Possessing this plenary power to exclude structures from navigable waters and dominion over flowage and its product, energy, the United States may make the erection or maintenance of a structure in a navigable water dependent upon a license."
>
> *United States* v. *Appalachian Electric Power Company*, 311 U. S. 377, 424, 85 L. ed. 243, 61 S. Ct. 291.

None but licensees are authorized by §21 of the Federal Power Act to exercise the right of eminent domain.

16 USC §814.

The Federal Power Act applies to dams constructed before its passage. It was so held in *Wisconsin Public Service Commission v. Federal Power Commission*, 147 F. 2d 743. There "the utility corporation makes the point that since authority to construct and maintain the dam had been granted by the State of Wisconsin, it constituted a permit for the reconstruction of the dam and the Commission was without power to require the corporation to take out a license under the Federal Power Act." This contention was rejected by the Court because to accept it would be to disregard the plain language of Section 23 of the Act, 16 U.S.C. §817.

Petitioner's argument of its Point I, (pages 12-17) proves that no federal question is before this court. Thus, the statement in the Petition for writ of certiorari (page 14) that "no conflict had ever arisen between the Public Service Commission of Vermont and the Federal Power Commission with reference to condemnation" and the further statement (page 15) "condemnation is one of the subjects which the Federal Power Act confirms may be left within the jurisdiction of the states," both constitute admissions that no real federal question is presented here.

Again on page 17 Petitioner says "condemnation by the Vermont Public Service Commission could not interfere in the slightest with the exercise by the Federal Power Commission of the powers and remedies conferred upon it by statute." While respondents are not prepared to agree that this sweeping assertion is true, certainly a necessary corollary is that: The denial by the state commission of condemnation to a petitioner, having no license from the Federal Power Commission, whether for lack of jurisdiction or some other reason, does not interfere in the slightest with the exercise of the functions and powers of the Federal Power Commission.

Indeed, there seems to be no sense in petitioner's presentation and argument of its Point I. It is wholly immaterial and irrelevant. At no time in this long litigation has the failure of the Federal Power Commission to direct Citizens to discontinue operations or to halt its condemnation proceeding been the subject of contention by either

party. Neither did petitioner nor respondents raise either of those points in the proceedings before two state tribunals, and the opinion of the Vermont Supreme Court makes no mention of them. No reference to them, express or implied, has been made heretofore during this lengthy litigation. They are extraneous matters having no bearing whatsoever upon the question which was before the Vermont Supreme Court; namely, whether the Vermont Public Service Commission had jurisdiction of the eminent domain proceeding in the admitted absence of both a public good certificate and a license from the Federal Power Commission, one of which at least was required by the Vermont Statute in order to give the Vermont Public Service Commission jurisdiction over an eminent domain proceeding. The quotations from their brief on pages 12 and 13 in the Petition for Certiorari show that the contention of respondents was that Clyde River was subject to the jurisdiction of the Federal Power Commission because it was navigable. That question was already *res adjudicata* at the time the Vermont Public Service Commission made its first findings on August 26, 1960. (Appendix C page 19a; *Citizens Utilities Company* v. *Federal Power Commission*, 295 F. 2d 959; Respondents' Appendix L page 13a).

The main question litigated throughout all previous proceedings has been whether the Federal Power Commission had jurisdiction of Clyde River as a navigable water or a stream which affected navigable waters. This question is not present in this certiorari proceeding, for the reason that it is *res adjudicata*.

The issue of jurisdiction in the Federal Power Commission over Clyde River is now a closed book, since both the Circuit Court of Appeals and the Vermont Supreme Court have either upheld or recognized that jurisdiction. It has been settled that the Federal Power Commission did have jurisdiction over the entire river since the decision of the Circuit Court of Appeals May 24, 1960. (Appendix F page 52a; Respondents' Appendix L page 13a).

Citizens Utilities Company v. *Federal Power Commission*, 279 F. 2d 1;

See also same case 295 F. 2d 959.

It is equally certain that the jurisdiction of the Vermont

Public Service Commission in eminent domain proceedings, both by state and federal law, depends upon the production of a license from the Federal Power Commission. Consequently, the fact that the Federal Power Commission did not interfere with the proceedings before the Vermont Public Service Commission, of which petitioner makes so much (Petition pages 12-14), has no bearing. It would have been improper for the Federal Power Commission thus to interfere with the proceedings before the Public Service Commission. The opinion of the Vermont Supreme Court makes no mention of any claim by the petitioner that some action should have been sought before and relief granted by the Federal Power Commission in order for the Vermont Court to justify its decision. If such a claim was made by the petitioner in its brief and in argument before the Vermont Supreme Court, it was ignored by that Court in the opinion, evidently because it was considered too frivolous to warrant attention.

No act of Congress could give a state court or other tribunal jurisdiction of a condemnation proceeding unless the state legislature had first delegated this function, which is legislative in character, to some state court.

Vermont passed a law which gave the Public Service Commission jurisdiction of eminent domain proceedings only in case a State public good certificate or a Federal license had first been issued. It is undisputed that neither was issued in this case. The only question therefore is the applicability of this Vermont statute. As already pointed out page 7 of this brief, federal condemnation proceedings must be in accordance with state law. By initiating this proceeding Citizens invoked the Vermont statute, and now it claims that the Vermont tribunals are not authorized to decide questions relating to their own jurisdiction because of the Federal Power Act. The claim is unreasonable and wrong.

What rights has Citizens Utilities Company under the Federal Power Act? Certainly none, because it has consistently opposed the jurisdiction and contested by appeal and in every possible way the orders of the Federal Power Commission.

3). The petitionees in a condemnation proceeding have

an undoubted right to raise the question of jurisdiction in the tribunal where the case is pending.

Their property cannot be taken except by due process of law pursuant to the Vermont Constitution.

Stearns v. *City of Barre*, 73 Vt. 281, 291, 297.

Failure to comply with the requirements of state law is a good defense to the taking.

United States v. *37.6 Acres of Land*, 126 F. Supp. 789.

The condemnation proceedings, before the Vermont Public Service Commission were judicial in character to the extent that "every question may be raised by the land owner and there and then determined which affect his rights."

In re City of Buffalo, 139 N. Y. 422, 34 N. E. 1103.

Statutes authorizing the taking of public property for private use must be strictly followed.

Cincinnati v. *Vester*, 281 U. S. 439, 448, 74 L. Ed. 950;

Crawford v. *Bridgeport*, 92 Conn. 431, 103 A. 125.

In fact, want of jurisdiction may and should be raised by the court of its own motion, as was done in Bellows Falls Hydro-Electric Corp., *supra*, at pages 444, 445.

There the Vermont Supreme Court in referring to the Federal Power Act, 16 USCA §791a et seq. said "this court is bound to take judicial notice of all provisions of that Act which apply to the subject matter of the petition." Thus, the Vermont Court considered itself bound to read and apply the law even though the respondents, as petitioner's brief argues, might have no standing or business to request the Court to observe the law.

Petitioner's Point II is based upon the proceedings before the Federal Power Commission in which the respondents took no part. Apparently petitioner misunderstands the position of the respondents when it argues that they relied primarily upon the fact that petitioner had violated certain orders of the Federal Power Commission. While it is true that Citizens Utilities Company had not complied with the orders of the Federal Power Commission with respect to filing an application for a license, the respondents, as their plea shows, challenged the jurisdiction of the state commission upon the ground that the river was a navigable water

of the United States. True, respondents relied upon the fact that the navigability of the river and the authority of the Federal Power Commission over the entire river had been established as *res adjudicata*. Therefore, Citizens Utilities Company, having no federal license, had completely failed to meet the jurisdictional requirements of the Vermont statute which plainly required a license from the Federal Power Commission in the case of waters subject to federal control. Moreover, by the operation of its facilities on the river without a license, Citizens Utilities was in violation of the requirements of 16 USC §817, notwithstanding the patience and forebearance of the Federal Power Commission in allowing time for the petitioner to challenge its jurisdiction and orders before complying with the requirements of this section.

Thus, it was not failure to comply with an order of the Federal Power Commission that the respondents set up as a defense depriving the Public Service Commission of jurisdiction, but rather the failure to obtain the license required by the Vermont statute and by the Federal Power Act.

In as much as the question of navigability is no longer in dispute, the opinion of the Vermont Supreme Court presents only the simple and obvious application of Vermont statutory requirements which are prerequisite to Vermont Public Service Commission jurisdiction. The opinion is also wholly consistent with the Federal Power Act provision which authorizes licensees only to prosecute eminent domain proceedings.

The petition for certiorari seems absurd and should be dismissed in view of all of the litigation that has been carried on for the last six years. As soon as the eminent domain proceeding was begun, respondents filed an action in the United States District Court to compel specific performance of the contract for acquisition of their property by Citizens and a decree was entered granting the requested relief. Citizens appealed to the United States Court of Appeals, which reversed the judgment of the District Court, on the ground that comity required that the District Court should not have decided the question of the Public Service Commission jurisdiction raised by respondents' pleading. In accordance with the decision of the Court of Appeals the eminent

domain proceedings, which had been held in abeyance by the Public Service Commission, were activated, with the result that the Public Service Commission held it did have jurisdiction, notwithstanding Petitioner lacked both a state certificate of public good and a license from the Federal Power Commission.

An appeal was taken by respondents to the Supreme Court of Vermont, which reversed the Public Service Commission and dismissed the proceedings for lack of jurisdiction. Thus, everything that the Court of Appeals said should be done to procure a determination of the jurisdictional question in the state courts has been accomplished.

Now that following the direction of the Court of Appeals, the highest state court has decided that the Public Service Commission had no jurisdiction, there is nothing further for this Court to review unless a federal question is involved. Because the question of jurisdiction depends on state law, and the Vermont Supreme Court has found that the requirements of state law with respect to a license from the Federal Power Commission have not been met, the jurisdictional question is a settled issue.

The question of primary administrative jurisdiction, briefed at pages 19 to 24 of the Petition, could have been and in fact was raised by Citizens Utilities Company by means of its briefs and in argument both before the Circuit Court of Appeals and the Vermont Supreme Court. In their respective opinions, neither of these appellant tribunals paid any attention to this question, except that the Circuit Court of Appeals directed that the question of jurisdiction over the condemnation proceedings should be determined by the Vermont Commission and state courts.

Undoubtedly, petitioner must have had its own reasons for seeking to escape the jurisdiction of the Federal Power Commission and opposing so strenuously the finding of navigability and the order requiring a license. Whatever those reasons were, Petitioner should now abide the consequences, for as the Vermont Supreme Court well said, Appendix B page 13a:

> "No question would be presented here if the petitioner had seen fit to secure the license it is under order to obtain by the Federal Power Commission."

CONCLUSION

The Vermont Supreme Court decided a jurisdictional question of state law. That decision is correct, and in accordance with applicable law, both state and federal. No federal law or right thereunder has been drawn in question. Consequently, the petition should be dismissed.

Respectfully submitted,

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St. Johnsbury, Vt.
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Elsinor Prouty Mallory

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Genevieve Prouty Gage and
Third National Bank & Trust
Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 731

CITIZENS UTILITIES COMPANY (NEWPORT ELECTRIC DIVISION),

Petitioner,

vs.

CHARLES S. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY,

Respondents.

RESPONDENTS' APPENDIX

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Woolworth Building,
Rutland, Vermont

ARTHUR L. GRAVES,
65 Railroad Street,
St. Johnsbury, Vermont,
Attorneys for Respondents.

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Appendix G

STATE OF VERMONT

SUPREME COURT

December 28, 1961.

Mrs. Florence Smith, Clerk,
Public Service Board,
Montpelier, Vermont. Re: 1910, Wash, Citizens Utilities Co. v. Prouty, et als.

Dear Mrs. Smith:

This office has not received any motion for permission to re-argue from the office of Mr. C. G. Parker of Morrisville, Vt. within the time extended by the Supreme Court, i.e., December 22, 1961, for the filing of such motion.

The case is therefore certified to the Public Service Board on the entry of November 21, 1961 in this cause according to the notice of such entry mailed to you and counsel in this case on that date.

Very truly yours,

NORMAN E. PEDUZZI
Clerk.

CC: Mr. C. G. Parker
Mr. E. W. Lawrence
Mr. F. A. Bosworth
Mr. A. L. Graves

Appendix H

STATE OF VERMONT
PUBLIC SERVICE BOARD

No. 2742

CITIZENS UTILITIES COMPANY
(Newport Electric Division)

HEARING
Montpelier, Vermont
January 1962

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINORE PROUTY MALLORY AND THIRD NATIONAL BANK AND TRUST COMPANY

ORDER OF DISMISSAL

Pursuant to opinion of the Supreme Court of Vermont filed November 21, 1961, and certificate as to final entry in that Court dated December 2nd, 1961, the order of the Public Service Commission dated November 10, 1960, purporting to authorize the Petitioner, Citizens Utilities Company, to condemn and to acquire the Petitioners' property is vacated and annulled and the Petition of Citizens Utilities Company is dismissed for want of jurisdiction.

Dated at Montpelier in the County of Washington and State of Vermont this 29th day of January, 1962.

JOHN D. PETERSON
WILLIAM F. SINCLAIR
Public Service Board of Vermont

OFFICE OF CLERK
FILED: February 1, 1962
ATTEST: Florence Smith
CLERK

Appendix H

STATE OF VERMONT

PUBLIC SERVICE BOARD

I, FLORENCE SMITH, Clerk of the Public Service Board of the State of Vermont, having by law the custody of the seal and all the records, books, documents and papers of, and appertaining to said Board, hereby certify that the pages hereto attached are a true copy of Order of Dismissal, dated January 29, 1962, issued in PSB Case No. 2742 in re Citizens Utilities Company (Newport Electric Division) v. Charles T. Prouty, Genevieve Prouty Gage, John A. Prouty, Elsinore Prouty Mallory and Third National Bank and Trust Company, as fully and completely as the same appear by the original files and records of said Board.

Given under my hand, and the seal of said Board at Montpelier, in the County of Washington, on this 1st day of February, A. D., 1962.

(SEAL)

FLORENCE SMITH, Clerk

Appendix 1

STATE OF VERMONT
PUBLIC SERVICE COMMISSION

No. 2742

CITIZENS UTILITIES COMPANY
(Newport Electric Division)

v.

CHARLES T. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY, AND THIRD NATIONAL BANK AND TRUST COMPANY

Hearing at
Montpelier, Vermont
April 28, 1959

PRESENT: Commissioners Ross, Sinclair and Lowe.

APPEARANCES: Clifton G. Parker, Esq. and Arthur S. Friedman, Esq. of the law firm Gallop, Climenko & Gould
For Citizens Utilities Company

Arthur L. Graves, Esq.
For Elsinor Prouty Mallory

Edwin C. Lawrence, Esq.
For Charles T. Prouty

The following plea was presented in behalf of John A. Prouty and Elsinor Prouty Mallory entitled:

"PLEA TO THE JURISDICTION

Now come the Petitioners, John A. Prouty and Elsinor Prouty Mallory, in their own proper person specially and not otherwise, solely for the purpose of this plea to the jurisdiction of The Commission, and say that this Commission ought not to have or take further cog-

nizance of the Petition for Condemnation in the above entitled proceedings, because they severally say that the Clyde River upon which are situated the realty and interests in the City of Newport, water power, dam, and water privileges, which the Petitioner is seeking to condemn is a navigable stream and waters of the United States; and that the Petitioner for the purpose of developing electric power and energy has never applied for or obtained a license pursuant to the Federal Power Act, and has never applied for or obtained a permit or valid existing right-of-way granted prior to June 10, 1920, to construct, operate or maintain any dam across, along or in such navigable waters of the United States, to wit, Clyde River, and this the said Petitioners are ready to verify; wherefore, they pray judgment whether the Honorable Public Service Commission of the State of Vermont can or will take further cognizance of the aforesaid proceedings.

s/ John A. Prouty,

s/ Elsinor Prouty Mallory"

A similar plea was also filed by Charles T. Prouty, Genevieve Prouty Gage, and Third National Bank and Trust Company.

"ORDER

Upon consideration of the oral arguments and briefs on said prayers for the Commission to determine whether to proceed to hear said condemnation action by Citizens Utilities Company, the Commission determined that said plea ought to be and is denied and that it will take further cognizance of the aforesaid proceedings."

Appendix I

Dated at Montpelier, County of Washington and State of Vermont, this 12th day of June, A.D. 1959.

s/ CHARLES R. ROSS
s/ WILLIAM F. SINCLAIR
s/ NORMAN LOWE

Public Service Commission of Vermont

OFFICE OF CLERK
FILED: June 12, 1959
ATTEST: s/ Florence Smith
CLERK

STATE OF VERMONT

PUBLIC SERVICE COMMISSION

I, FLORENCE SMITH, Clerk of the Public Service Commission of the State of Vermont, having by law the custody of the seal and all the records, books, documents and papers of, and appertaining to said Commission, hereby certify that the pages hereto attached are a true copy of Order Denying Plea, dated June 12, 1959, issued in PSC Case No. 2742, in re Citizens Utilities Company (Newport Electric Division) vs. Charles T. Prouty, Genevieve Prouty Gage, John A. Prouty, Elsinor Prouty Mallory and Third National Bank and Trust Company, as fully and completely as the same appear by the original files and records of said Commission.

Given under my hand, and the seal of said Commission at Montpelier, in the County of Washington on this 12th day of June, A. D., 1959.

(SEAL)

FLORENCE SMITH, Clerk

Appendix J

Extracts from Opinion and Order of the Federal Power Commission, made part of record by Vermont Public Service Commission in its Additional Findings of Fact October 17, 1960, Appendix C, page 44a.

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman; Frederick Stueck, William R. Connole, Arthur Kline and John B. Hussey

In the Matter of	Docket Nos. E-6710 and E-6760
CITIZENS UTILITIES COMPANY	

OPINION NO. 318
Unofficially Reported 27 PUR 3d 1
OPINION AND ORDER REQUIRING APPLICATION FOR LICENSE
(Issued February 16, 1959)

NAVIGABILITY OF THE CLYDE RIVER

In this proceeding we are first [illegible] on whether Citizens' developments are located [illegible] navigable water" of the United States, for Section 23 of the Act provides that it shall be unlawful for any person to construct, operate or maintain a dam or other work [illegible] any of the navigable waters of the United States. As indicated above, Citizens contends that none of its developments is located in a "navigable water" of the United States, and the State of Vermont, the State Water Conservation Board, and Barton Village take the same position. Staff counsel argue that the Clyde River is a "navigable water" from its mouth to its source at Spectacle Pond and the Fish Clubs are in agreement.

Appendix J

EFFECT ON INTERESTS OF INTERSTATE OR FOREIGN COMMERCE

Whether or not the Clyde is navigable above the outlet of the canal at its Unit No. 11 development, Citizens' developments on the river are plainly built to control the flow of the river so as to bring about the most efficient generation of power. By the operation of its project works—Unit No. 11, Newport, Charleston, Seymour Lake and Echo Pond—Citizens can and does affect the navigable capacity of the river in the stretch below its Unit No. 11 development. We have before us not five separate projects but project works at five locations physically interdependent and operated in coordination for power purposes, so that the entire group is maintained as a single, integrated unit of development for the purpose of exploiting the resources of the river.

* * * * *

We conclude that the maintenance and operation of Citizens' facilities on the Clyde River can and do affect the navigable capacity of the river downstream, including a portion of the river below Citizens' Unit No. 11 plant, and are thus subject to our jurisdiction.

NECESSITY FOR ACTION BY THIS COMMISSION IN ACCORDANCE WITH THE POWER ACT

Concluding as we do that the Clyde River is a navigable water of the United States from Island Pond to Lake Memphremagog and that even if it were navigable only below Unit No. 11, Citizens' facilities are on waters over which we have jurisdiction because they affect navigable waters, the question arises as to what action is required and appropriate on our part. As to our authority we note that upon making an investigation of the occupancy of hydro-electric facilities of bodies of water over which Congress has jurisdiction, under Section 4(g) we are authorized to issue such orders as we "may find appropriate, expedient, and in the public interest to conserve and utilize the navigation and water-power resources of the region." Under Section 23(b) it is unlawful for any person to maintain a dam on any navigable

water of the United States except under the terms of a permit or license. Under Section 309 we are authorized to issue such orders as we may find necessary or appropriate to carry out the provisions of the Act. Among the objectives of the Act particularly important here are those set forth in Section 10(a) "that the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehenisve plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, and for other beneficial public uses, including recreational purposes."

The record has shown interference with boating on the Clyde River but the principal injury caused by Citizens' facilities has been damage to fish at their spawning grounds below the Newport powerhouse. Involved are Atlantic salmon which travel via the St. Lawrence, the St. Francis, the Magog River and Lake Memphremagog to spawn in the Clyde. Other fish injured by lack of water withheld by Citizens' project works include steelhead trout, land-locked salmon and suckers. Photographs and testimony in the record portray quantities of fish struggling and dying in the shallow water in the stream bed during the spring spawning season.

In this situation we shall require that Citizens apply for a license for all of its project works so that by appropriate conditions we may, among other things, give such relief to the recreational and commercial interests involved in boating and fishing as may be required.

Because of the full discussion of the issues in the briefs and the exceptions filed we are of the opinion that oral argument is not necessary.

The Commission further finds:

(1) Citizens Utilities Company (Citizens) is a corporation organized and existing under the laws of the State of Delaware.

Appendix J

(2) Clyde River from near its source at Island Pond to its mouth at Newport, Vermont, is a navigable water of the United States.

(3) The maintenance and operation of Citizens' Unit No. 11, Newport and Charleston hydro-electric developments, and the Echo Pond and Lake Seymour reservoirs referred to above, have affected and are capable of continuing to affect the navigable capacity of the Clyde River downstream from such facilities and will affect the interests of interstate or foreign commerce.

(4) It is appropriate, expedient, and in the public interest to issue an order to conserve and utilize the navigation and water resources of the region of the Clyde River basin occupied by Citizens' project works set forth in (3) above, for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, and for other beneficial public uses, including recreational purposes.

The Commission orders:

(A) Citizens Utilities Company shall file an application for license under the Federal Power Act for the continued operation and maintenance of its project consisting of the Unit No. 11, Newport and Charleston hydro-electric developments and the Seymour Lake and Echo Pond dams, referred to above.

(B) Such application shall be filed in accordance with the Commission's Regulations under the Federal Power Act and within 120 days from the date of issuance of this order.

(C) Exceptions not specifically granted herein are hereby denied.

(D) Exhibit 22 is hereby admitted into evidence.

(E) Citizens' motion for oral argument is hereby denied.

By the Commission. Commissioner Kline dissenting. Commissioner Hussey not participating.

s/ JOSEPH H. GUTRIDE,
Joseph H. Guthride,
Secretary.

Appendix K

COPY—PETITIONEES' EXHIBIT 5

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Jerome K. Kuykendall, Chairman
Frederick Stueck, Arthur Kline and
John B. Hussey

In the Matter of	
CITIZENS UTILITIES COMPANY	Dockets Nos. E-6716 and 6760

ORDER DENYING APPLICATION OR AMENDMENT OF PARAGRAPH (C) OF COMMISSION ORDER DENYING REHEARING

(Issued June 19, 1959)

On May 22, 1959, Citizens Utilities Company applied for an amendment of paragraph (C) of the Commission's order issued April 3, 1959, denying an application for rehearing on the Commission's order issued February 16, 1959, requiring Citizens to apply for a license under the Federal Power Act for the continued operation and maintenance of its hydroelectric developments on the Clyde River in Vermont and on a tributary thereof. Specifically, Citizens seeks to have paragraph (C) of the order of April 3, 1959, amended so as to require the release of 35 cubic feet of water per second at Unit No. 11 diversion dam from April 3 to May 20, 1959 only, and for the same period of each year thereafter, during the pendency of a review of the proceedings.

Paragraph (C) of the Commission's order of April 3, 1959, requires that until further order of the Commission, Citizens shall release a minimum flow of 35 cubic feet of water per second through the sluice gate of its Unit No. 11 diversion dam in the Clyde River from the date of issuance of that order through June 30, 1959, and thereafter each year from April 1 through June 30 and during such additional

period or periods as fish are spawning or migrating in the river below the Unit No. 11 diversion dam.

The Fish and Game Service of the State of Vermont by letter of June 1, 1959, has stated that to insure maximum survival of trout during spring spawning, it is necessary that no curtailment of the volume of flow required by the order of April 3, 1959 should be permitted. By letter dated June 19, 1959, from the Secretary of the Interior, the United States Fish and Wild Life Service reports that adult rainbow trout usually enter the river from Lake Memphremagog during April and remain until the middle of May. Many rainbow trout eggs are not hatched until well past the middle of June. The river serves as a nursery area for these young fish.

The Fish and Game Service of the State of Vermont and the Secretary of the Interior recommend that the minimum flow of 35 cubic feet per second be continued from April 1 through June 30 and that the application of Citizens Utilities Company for amendment of paragraph (C) of the Commission's order of April 3, 1959, be denied.

DC 19

The Commission further finds:

It is appropriate and in the public interest in carrying out the provisions of the Federal Power Act that the application for amendment of the Commission's order of April 3, 1959, be denied.

The Commission orders:

The aforesaid application for amendment of the order of April 3, 1959, is hereby denied.

By the Commission.

/s/ JOSEPH H. GUTRIDE,
Joseph H. Gutride, Secretary.

This is certified to be a true and correct copy of a document in the files of the Federal Power Commission.

Date: January 3, 1961 /s/ J. H. GUTRIDE,
J. H. Gutride, Secretary.

Federal Power Commission

Appendix L

CITIZENS UTILITIES COMPANY,
Petitioner,

FEDERAL POWER COMMISSION,
Respondent.

Docket 27168

United States Court of Appeals
Second Circuit.

Argued Oct. 30, 1961

Decided Nov. 2, 1961

Petition to review an order of the Federal Power Commission.

PER CURIAM.

Motion of the Federal Power Commission to dismiss the petition for review is granted and petitioner's motion for a stay is denied as moot; all issues now before us were fully decided in Citizens Utilities Co. v. F. P. C., 2 Cir., 279 F. 2d 1, and are here *res judicata*.

Office Supreme Court, U.S.
FILED
MAR 26 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

No. 731

CITIZENS UTILITIES COMPANY, NEWPORT ELECTRIC DIVISION,

Petitioner,

v.

CHARLES S. PROUTY, GENEVIEVE PROUTY, JOHN A. PROUTY, ELSIE OR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 731

CITIZENS UTILITIES COMPANY (NEWPORT ELECTRIC DIVISION),

Petitioner,

vs.

CHARLES S. PROUTY, GENEVIEVE PROUTY GAGE, JOHN A. PROUTY, ELSINOR PROUTY MALLORY and THIRD NATIONAL BANK & TRUST COMPANY,

Respondents.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondent's contention (Brief, p. 7) concerning the jurisdiction of this Court overlooks the fact that there is brought into question the propriety of the construction and application by the Supreme Court of the State of Vermont of a statute of the United States, i.e., the Federal Power Act (Petition, Point 2, pp. 18 et seq.). In such a case, this Court has jurisdiction to review by certiorari (see citations, Petition, p. 2).

Respondent asserts (Brief, p. 13) that Petitioner, having invoked the Vermont statute, is "unreasonable and wrong" in claiming that the Vermont tribunals are not authorized to decide questions relating to their own jurisdiction because of the Federal Power Act. It is submitted that there is nothing either "unreasonable" or "wrong" in Petitioner's contention, inasmuch as the Court's error

is claimed to be not in its construction of the Vermont statute, but in its construction of the Federal Power Act.

Throughout their brief (pp. 4, 5, 6, 8, 12, 13), Respondents assert that the record contains nothing to "suggest" that Petitioner had complied with the statutory requirements of the State of Vermont that it have a Certificate of Public Good, and it is stated further (pp. 4, 5) that Petitioner evidently intended to create the "erroneous and utterly misleading" impression that the development in question was of such "antiquity" that Petitioner was not required to comply with the statute.

The answer to this gratuitous charge is found in the Report of the Public Service Commission of the State of Vermont, in which the Commission said (Appendix C, p. 25a, italics ours):

> "The Petitioner also claims that the Petitioner does not possess a certificate of public good authorizing the project. In determining whether there is a certificate, 10 V.S.A. Sec. 702 which provides that a permit is required was not passed until 1929. Thus, most of the original project here involved was constructed before there was any such statutory requirement. It was not until 1945, that a company in case of dams was required to show a certificate before proceeding in eminent domain cases under Sec. 111(a), see 1945, No. 138 Sec. 6. In Docket 2680, dated September 27, 1954, the Petitioner did secure authorization under said section to make certain modifications on the dam and said modifications were permitted. Accordingly, so far as the record stands, no authorization was needed for the original dam since it was in existence before the time a permit was required. There have been no alterations appearing in the record which would require additional authorization other

than those already granted. *Therefore, we find that the Petitioner does possess all authorization required under Sec. 111(a).*"

This finding of the Public Service Commission was not disturbed by the Supreme Court of Vermont. As noted by the Chief Judge in his dissent (Appendix B, p. 16a):

> "The opinion of the majority does not rest on any error growing out of this finding."

Respondent-states (Brief, p. 13) that it would have been "improper" for the Federal Power Commission to "interfere" with proceedings before the Public Service Commission. Nowhere has Petitioner suggested that the Federal Power Commission should have attempted to exercise any jurisdiction over the Public Service Commission. The Federal Power Act leaves the Federal Power Commission free to stand by, as it did here for, at least twenty-nine years (Petition, p. 8), and permit state agencies to exercise jurisdiction, subject, of course, to the power of the Commission to step in and exercise an overriding jurisdiction whenever, and to the extent, it might deem it advisable to do so. It is clear, we submit, that the Federal Power Commission did not intend to intervene here to the extent of having Petitioner discontinue the condemnation proceeding it was then prosecuting before the Vermont Public Service Commission. If the Federal Power Commission had so intended, it would not have extended Petitioner's time to apply for a license for a period which, as appears from the terms of the order granting the extension, might continue for a period of years (Petition, p. 9), while leaving Citizens free to continue operating its project, and not directing it to dis-

continue its pending condemnation proceeding, in the meantime.* The reason is obvious: the condemnation would not create any new operation, or in any respect affect the existing one; it would merely effectuate a contract provision for the continued use by Citizens, *as owner*, of property which it and its predecessor had used for the self-same purposes, *as tenants*, since prior to the making of the contract some thirty years previously. Naturally, the Federal Power Commission was not concerned with such a proceeding, and was content to have it continue to its conclusion before the State agency where it had long been pending.

Dated: New York, New York
March 23, 1962.

Respectfully submitted,

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* The statement in the opinion of the Vermont Supreme Court that Petitioner did not have the license under the Federal Power Act "which it was ordered to obtain by the Authority" (Appendix B, p. 52a) overlooks the fact that Petitioner's time to apply for the license had been so extended and was still unexpired.